89-1897

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BILLIE R. SCHLANK,

Petitioner,

v.

KATHERINE A. WILLIAMS, Acting Administrator, Rehabilitation Services Administration, Department of Human Services, Government of the District of Columbia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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98

QUESTIONS PRESENTED

1. Whether the Randolph-Sheppard Act, as amended, 20 U.S.C. §§ 107 to 107f, permits a court to award attorneys' fees to a prevailing blind vendor against a state agency, in this case the District of Columbia, where the state has denied the blind vendor the opportunity for an administrative evidentiary hearing required by the Act to resolve her complaints, and the vendor must resort to the court in the first instance.

2. Whether the Randolph-Sheppard Act, as amended, 20 U.S.C. §§ 107 to 107f permits a prevailing blind vendor to be awarded attorneys' fees incurred at an administrative evidentiary hearing or at an arbitration following that hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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KATHERINE A. WILLIAMS, Acting Administrator, Rehabilitation Services Administration, Department of Human Services, Government of the District of Columbia[1]

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, Mrs. Billie R. Schlank, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet.App. 1a-27a) is published at 572 A.2d 101 (D.C. App. 1990).

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[1] The other named defendant, Melvin W. Jones, Director, Department of Finance and Revenue, Government of the District of Columbia, is not a party to the issues sought to be reviewed.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions are 20 U.S.C. §§ 107, 107a, 107b, 107d-1, 107d-2, and 1-7e. The relevant regulations are 34 C.F.R. 395.1 to 395.17. These statutes and regulations are set forth in petitioner's appendix at 47a to 78a.

STATEMENT OF THE CASE

Petitioner seeks review of a final decision of the District of Columbia Court of Appeals affirming orders of the District of Columbia Superior Court that granted, in part, petitioner's motion for summary judgment, but denied petitioner's motion for attorneys' fees. Mrs. Billie R. Schlank, petitioner, is a blind woman who operates a vending stand in the State Department Building in Washington, D.C. She was licensed as a blind vendor on October 1, 1976, and was assigned to a vending facility in the State Department building on February 1, 1977. The stand is operated as part of a federally-assisted program for blind persons known as the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f.[2] Pet.App. 2a-4a. Kather-

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[2] For a discussion of the legislative history of the Randolph-Sheppard Act, See, *Texas State Commission for the Blind and State of Texas* v. *United States*, 796 F.2d 400 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1030 (1987); *Randolph-Sheppard Vendors of America* v. *Weinberger*, 602 F.Supp. 1007 (D.D.C. 1985), va-

ine A. Williams, respondent, is the Acting Administrator, Rehabilitation Services Administration, an agency of the District of Columbia Department of Human Services (hereinafter referred to as "RSA"). *Id.*, 7a.

The Randolph-Sheppard Act was passed "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107 (a). The program is administered on the federal level by the Rehabilitation Services Administration of the Department of Education (DOE), 20 U.S.C. § 107a (a)(1), which designates state agencies to run the program on the local level. *Id.* at § 107a (a)(5); 34 C.F.R. § 395.2. RSA is the state agency that administers the program in the District of Columbia. Pet.App. 3a. The state agency then licenses eligible blind persons who are authorized to operate vending facilities on federal property. 20 U.S.C § 107a (a)(5); 34 C.F.R. § 395.7. The state agency also agrees to provide written procedures allowing a blind vendor dissatisfied with any action taken by the agency in administering the program to obtain a full evidentiary hearing at the state level, and to submit grievances not otherwise resolved to

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cated and remanded, 795 F.2d 90 (D.C. Cir. 1986); *Delaware Dept. of Health and Social Services* v. *U.S. Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985); *McNabb* v. *U.S. Dept. of Education*, 862 F.2d 681 (8th Cir. 1988) *cert. denied* ___ U.S. ___, 110 S.Ct. 55 (1989), 107 L.Ed 2d 23 (1989); *Committee of Blind Vendors of the District of Columbia* v. *District of Columbia*, 695 F.Supp. 1234 (D.D.C. 1988).

DOE for arbitration. 20 U.S.C. § 107b (6); 34 C.F.R. § 395.13 (a).[3]

There are approximately 64 vending stands operated in the District of Columbia under the Randolph-Sheppard Program, and approximately 60 blind persons presently licensed to operate the stands.[4] The number fluctuates from year to year as operators drop out of the program or retire, and new operators are added.

This case arose from Mrs. Schlank's complaint for injunctive relief to enjoin RSA and the other named party-defendant from: (1) denying her the right to service the vending machines in the State Department building; (2) denying her promotion and transfer opportunities; (3) denying her the right to deduct legal fees incurred in the operation of her stand as business expenses; (4) denying her the right to incorporate; and (5) collecting from her unincorporated business franchise taxes. Pet.App. 7a. She filed her complaint with the District of Columbia Superior Court in the first instance, because the RSA had never adopted regulations establishing an administrative hearing process, and there was, therefore, no way for her to get to

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[3] 20 U.S.C. § 107d-1 (a) provides that a licensee dissatisfied with the outcome of a state evidentiary hearing may file a complaint with the Secretary of DOE, who "shall convene a panel to arbitrate the dispute." The complaint must be accompanied by supporting documents including the decision rendered at the state evidentiary hearing. 34 C.F.R. § 395.13 (a).

[4] 1988 Annual Report, Randolph-Sheppard Vending Facility Program, United States Department of Education, Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration, p. 29, Information Memorandum RSA-IM-89-23, July 14, 1989.

the second level arbitration at the federal level. *Id.*, 7a-8a.

On July 16, 1987, The D. C. Superior Court issued an order granting, in significant part, Mrs. Schlank's motion for summary judgment, and denying, in its entirety, RSA's cross-motion for summary judgment. Pet.App. 7a - 8a, 28a to 39a. The Court ruled that the RSA had failed to provide any administrative remedies as required under the Randolph-Sheppard Act, that Mrs. Schlank had done all that she could to exhaust those remedies, and that the issues were properly before the court and ripe for hearing. *Ibid.*

The Superior Court later granted Mrs. Schlank leave to file a motion for an interim award of attorneys' fees because she had substantially prevailed in the litigation to that point. The Court on March 9, 1988, however, denied her motion for interim attorneys' fees. *Id.*, 9a, 40a to 46a.

The rulings of the Superior Court of July 16, 1987, and of March 9, 1988, were appealed to the District of Columbia Court of Appeals. Among the issues appealed was whether legal fees incurred during the litigation should be paid by RSA. The D.C. Court of Appeals held that they should not. *Id.*, 16a-20a.

REASONS FOR GRANTING THE WRIT

A. The Decision of the District of Columbia Court of Appeals Conflicts With Decisions of Three United States Courts of Appeals and With the United States District Court for the District of Columbia

The District of Columbia Court of Appeals, the state court of last resort, has decided a federal question in a way that conflicts with the decisions of the third,

fourth, and eighth United States Circuit Courts of Appeals, and with a decision of the United States District Court for the District of Columbia, which is on all-fours factually and legally with the instant case.

The D.C. Court of Appeals held that the Randolph-Sheppard Act does not provide for an award of attorneys' fees to a blind vendor wronged by state agency action. The court considered and rejected the reasoning in *Delaware Department of Health and Social Services* v. *U.S. Dept. of Education*, *supra*, n.2 and found that there was no statutory entitlement for an award of attorneys' fees to a prevailing blind vendor wronged by state agency action Pet.App. 16a to 20a. The D.C. Court of Appeals also considered and rejected the cases of *Almond* v. *Boyles*, 792 F.2d 451 (4th Cir. 1986), *aff'g*, 612 F. Supp. 223 (E.D.N.C. 1985), and *McNabb* v. *U.S. Dept. of Education*, *supra*, n.2.

Delaware Department of Health and Social Services v. *U.S. Dept. of Education*, *supra*, has construed the Randolph-Sheppard Act to clearly authorize an award of attorneys' fees. Although the court in *Delaware Dept. of Health* recognized that normally the American rule, as described in *Alyeska Pipeline Service Company* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), prevents successful litigants from recovering attorneys' fees from a sovereign in the absence of either statutory authority or an express contractual term providing for an award to the prevailing party, it found that attorneys' fees *were* an appropriate element of compensatory damages for breach of contract in the case of state violations of the Randolph-Sheppard program. The court held:

The question whether, as a matter of federal law, attorneys' fees are an appropriate element of damages for breach of contract between a blind vendor and a Randolph-Sheppard state licensing agency is entirely novel. It must be answered by determining what Congress intended—or perhaps might have said had the precise issue been addressed—when it required participating states to contract on the terms it specified. *Summit Valley, supra*, 456 U.S. 717, 102 S.Ct. 2112, 72 L.Ed.2d 511. The overall congressional intent is clear enough, and is characterized by an unusually heightened concern for persons handicapped by blindness who could, with help, become self-sufficient. The evolution of the Randolph-Sheppard Act from 1936 through 1974 shows increasing concern that the contractual remedies available to those vendors be expeditious and completely effective. Although the statute does not deal specifically with pre-arbitration legal expenses, the overall scheme strongly suggests that the states must undertake to make blind vendors whole for breaches of the contractual obligations imposed on them by virtue of participation in the Federal Blind Vendors Program. Unlike the back pay remedy discussed in part III A, the fee question is, in our judgment, a close one. We conclude on balance that the undertaking of the states participating in the Randolph-Sheppard program is to make blind vendors whole for state breaches of contract, and that an award of

> attorneys' fees as contract damages is, in this unique circumstance, an appropriate means to that end.

772 F.2d at 1139.

Two other Federal Courts of Appeals have since held that the Randolph-Sheppard Act authorizes the award of attorneys' fees.[5] *McNabb* v. *U.S. Dept. of Education, supra,* following the *Delaware Department of Health* case, held the Randolph-Sheppard Act authorizes the award of attorneys' fees, approving a District Court ruling that arbitration panels convened under the Act have the authority to award attorneys' fees. In doing so the court stated:

> When Congress undertook in 1974 to revise and modernize the Randolph-Sheppard Act, it did so "by removing some of the major external obstacles to the growth of the blind vendor program operating thereunder, by centralizing the direction of the program, by providing for substantial uniformity in the administration of the program by the States, and by *protecting the livelihood, rights, and economic interests of blind vendors.*" S.Rep. No. 937 to accompany S.2581, 93d Cong., 2d Sess. 3 (1974) (emphasis added). One of the

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[5] The only case to the contrary is a 1981 District Court case, *Georgia Dept. of Human Resources* v. *Bell,* 528 F.Supp. 17 (N.D. Ga. 1981). However, the Third Circuit in *Delaware* specifically noted and rejected it ho ding: "Further, we note that in *Georgia Dept. of Human Resources* v. *Bell,* 528 F.Supp 17 (N.D. Ga. 1981) relied on by Delaware, the court did not address the fee request in terms of either contract damages or obduracy." *Delaware Dept. of Health and Social Services* v. *U.S. Dept. of Education,* 772 F.2d at 1139, f.n.14.

> means by which Congress sought to protect the rights and economic interests of blind vendors was by requiring participating states to agree to submit to arbitration of grievances raised by vendors. 20 U.S.C. § 107d-1(a) (1982); see also *Delaware Dept. of Health and Social Services* v. *United States.*

(Lay, C.J. concurring and dissenting). 862 F.2d 684.

The Fourth Circuit, has also recently sustained an award of attorneys' fees under the Randolph-Sheppard Act to successful blind vendors. *Almond* v. *Boyles, supra,* 792 F.2d at 456-57.

In the case presently on review, the D.C. Superior Court was acting in the first instance because there were no administrative hearing procedures provided by RSA and thus no arbitration possible. Although, petitioner submits, the holding in the *Delaware* case is generally applicable to all judicial proceedings under the Randolph-Sheppard Act, under the circumstances of this case where there are no administrative proceedings, the holding in *Delaware Department of Health,* is particularly applicable. The District of Columbia has, by virtue of its participation in the Federal blind vendors program, undertaken to make blind vendors whole for breach of its contractual obligations. As stated by the court in the *Delaware Department of Health* case: "The blind vendors became, in effect, third party beneficiaries of the agreements between the participating states and the federal government." 772 F.2d at 1127.

The facts in *Committee of Blind Vendors of the District of Columbia* v. *District of Columbia, supra* are almost identical, yet the result is the opposite. In

that case the Committee of Blind Vendors of the District of Columbia, of which Petitioner is a member, sued RSA, the same agency-respondent in the U.S. District Court for various program derelictions. That Court affirmed the power of a court to act in lieu of an arbitrator under the Randolph-Sheppard Act, citing with approval the *Delaware Dept. of Health* case. *Committee of Blind Vendors of the District of Columbia* v. *District of Columbia, supra,* 695 F.Supp. at 1240-1241, n.1. The Court in its first opinion denying the District of Columbia's motion for summary judgment, relied heavily on the D.C. Superior Court's summary judgment opinion of July 16, 1987 in the instant case, Pet.App. 28a to 39a, on the issue of the lack of an administrative hearing process for blind vendors in the District of Columbia. 695 F.Supp. at 1239-1240. It also quoted a letter from the U.S. Department of Education dated January 19, 1988 which "has made clear that it will not entertain arbitration requests from vendors in the District of Columbia in light of the absence of a procedure for fair hearings". 695 F.Supp. 1240. The U.S. District Court in its second order in that case, on April 17, 1990, less than a month after the decision whose review is sought here, entered judgment for the blind vendors and awarded attorneys' fees against RSA, the same agency-respondent in this case. The District Court, in reliance on *Delaware Dept. of Health, supra* and *Almond* v. *Boyles, supra* stated that the court "agrees with that analysis and holds that plaintiffs are entitled to recover reasonable attorneys' fees" *Id.*, ___ F.Supp. ___, ___, 1990 W.L. 52574 (D.C.D.C.): 1990 U.S. Dist. Lexis 4429, pp. 76-77, April 17, 1990 (D.C.D.C.).

Although the District of Columbia Court of Appeals has attempted to distinguish each of the three United States Circuit Court of Appeals cases on their particular facts, this case can not be distinguished whatsoever, from the facts in the decision in the United States District Court for the District of Columbia. In neither case was there an administrative hearing process available as a result of the D.C. government's failure to adopt regulations. In both cases the blind vendors' only recourse was to file suit. There is simply no way to distinguish the two cases to explain the opposite results.[6]

B. The Decision has a Significant Impact on the Administration of the Randolph-Sheppard Act

According to the latest figures available, in fiscal year 1988, under the Vending Facility Program authorized by the Randolph-Sheppard Act, there were 3,296 vending facilities of which 1,030 were located on federal property and 2,266 on non-federal property. These facilities provided employment for 3,581

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[6] The D.C. Court of Appeals disagreed with *Delaware Dept. of Health* based on two cases which are inapposite. Pet.App. 19a-20a. The first case, *F.D. Rich Co., Inc.* v. *United States ex rel Industrial Lumber Co., Inc.*, 417 U.S. 116, 126-131, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974), was "everyday commercial litigation" between two contractors where the federal Court was asked to adopt a state "public policy" awarding fees in that type of case, which it declined to do. In the second case, *Summit Valley Industries, Inc.* v. *Local 112, United Bhd. of Carpenters and Joiners of America*, 456 U.S. 717, 102 S.Ct. 2112, 72 L.Ed 2d 511 (1982) attorneys' fees were sought in a private damages action between an employer and union brought in U.S. District Court. This court found no statutory authorization under the LMRA for such an award. Neither of these cases resemble the situation for which review is sought here.

blind vendors of which 1,118 were on federal property and 2,463 were on non-federal property.[7] In FY 1988 the gross income from all facilities totaled $365.5 million and the national average annual earnings of all vendors was $22,177.[8] The District of Columbia ranked 23rd out of 51 states and territories in the number of blind persons operating under the program.[9]

In fiscal years 1988 and 1989, there were 10 to 11 requests for federal arbitrations filed with DOE each year resulting from state evidentiary hearings.[10] The total number of state evidentiary hearings is not known but is obviously much higher than the number from which arbitration was sought. The issue of the award of attorneys' fees for blind vendors under the Randolph-Sheppard Act is a significant and continuing nationwide problem. Conflicting decisions from a state court of last resort and Federal Circuit Courts of Appeals will encourage confusion in an area of federal law that deserves to be settled. There are presently two arbitrations now pending in which attorneys' fees are the sole issue.[11] In terms of dollars, the issue is of extremely great significance to blind persons op-

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[7] FY 1988 Annual Report, *supra*, n.4 at pp. 1-2.

[8] Ibid.

[9] Id. at 27-28.

[10] Telephone interview with George F. Arsnow, Chief, Vending Facility Branch, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, United States Department of Education.

[11] They are *McNabb* v. *Arkansas Dept. of Human Services* on remand from the eighth circuit, *McNabb* v. *U.S. Dept. of Education*, *supra*, and *Gawith* v. *Idaho Commission for the Blind*, per telephone interview with George F. Arsnow, *supra* n.10.

erating vending facilities in federal and state government buildings, who, according to Department of Education figures, earn an average of only $22,177 annually. The right to an award of attorneys' fees does make a major difference in whether blind vendors can defend their rights provided to them by Congress under the Randolph-Sheppard Act against state agencies that are not protecting those rights. A determination of whether prevailing blind vendors have a right to an award of attorneys' fees in administrative proceedings under the Randolph-Sheppard Act is important in carrying out the Act's "purposes of providing blind persons with remunerative employment, and enlarging the economic opportunities of the blind and stimulating the blind to greater efforts in striving to make themselves self-supporting . . ." 20 U.S.C. § 107 (a).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-1295

BILLIE R. SCHLANK, APPELLANT,

v.

KATHERINE A. WILLIAMS, *et al.*, APPELLEES.

Appeal from the Superior Court of the
District of Columbia
(Hon. Frederick H. Weisberg and Hon. Gladys Kessler,
Motions Judges)

(Argued December 14, 1989 Decided March 22, 1990)

Sheldon I. Cohen for appellant.

James C. McKay, Jr., Assistant Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees.

Before STEADMAN, SCHWELB, and FARRELL, *Associate Judges.*

FARRELL, *Associate Judge*: This is an appeal from a grant of summary judgment on one count of a five count complaint in favor of appellee Katherine A. Williams, Acting Administrator of the Rehabilitation Services Administration of the District of Columbia Department of

Human Services (RSA). The appellant, Ms. Billie R. Schlank (Schlank), is a blind vendor operating a vending stand in the District of Columbia pursuant to the Randolph-Sheppard Act, as amended (the "Act"), 20 U.S.C. §§ 107 to 107f (1982), and its implementing regulations, 34 C.F.R. §§ 395.1 to 395.38 (1988). She contends that the Superior Court erred as a matter of law in concluding that the Act prohibits a blind vendor from deducting legal expenses incurred in the operation of her stand when calculating her net monthly profits. Such a deduction would have a significant effect on Schlank's income since all participating vendors are assessed a monthly administrative levy by RSA based upon a percentage of their net profits. Once collected, this levy goes into a general fund for the benefit of all blind vendors.

Schlank also appeals from an order denying her motion for attorneys' fees incurred in her administrative dealings with RSA and in this litigation. She contends that the Act allows for the recovery of attorneys' fees or, in the alternative, that such fees are warranted by RSA's history of bad faith or oppressive conduct in dealing with her both before and during the litigation.

We affirm the judgment and order of the trial court.

I.

The Randolph-Sheppard Act was passed "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107 (a). The program is administered on the federal level by the Rehabilitation Services Administration of the Department of Education (DOE), 20 U.S.C. § 107a (a)(1), which designates state agencies to run the program on the

local level. *Id.* at § 107a (a) (5); 34 C.F.R. § 395.2. RSA is the agency which administers the program in the District of Columbia. The state agency then licenses eligible blind persons who are authorized to operate vending facilities on federal property. *Id.*; 34 C.F.R. § 395.7.

The state agency is also responsible for the administrative functions involved in overseeing the program, including the collection of an administrative levy from each vendor based upon a percentage of net monthly proceeds.[1] This levy is then placed in a general fund for the benefit of all licensed vendors. In its application to DOE for designation as the state licensing agency, the state agency agrees, *inter alia*, that any funds set aside from vendors' net proceeds may be used only for the purposes of "(A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees . . . that funds under this paragraph shall be set aside for such purposes." 20 U.S.C. § 107b (3); 34 C.F.R. § 395.9.[2] The state agency also agrees to provide written procedures by which a blind vendor dissatisfied with any action taken by the agency in administering the program may obtain a full evidentiary hearing at the state level, and to submit grievances not otherwise re-

[1] The state agency may assume these functions on its own or may enter a written agreement "whereby another agency or organization undertakes to furnish services to blind vendors." 34 C.F.R. § 395.15 (a).

[2] In no event, however, "shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary." 20 U.S.C. § 107b (3).

solved to DOE for arbitration. 20 U.S.C. § 107b (6); 34 C.F.R. § 395.13 (a).[3] At the time of the proceedings in this case, RSA had established no such procedures in the District of Columbia.

Section 107d-3 (a) of the Act provides that any income derived from the operation of vending machines on federal property shall be distributed to vendors operating facilities on that property[4] or, if there are no vendors operating facilities on the property, to the state agency to be used for the benefit of all licensees.

II.

Schlank was licensed as a blind vendor in 1976 and was assigned to operate a vending facility in the State Department building in February of 1977. Her disputes with RSA began shortly thereafter.

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[3] 20 U.S.C. § 107d-1 (a) provides that a licensee dissatisfied with the outcome of a state evidentiary hearing may file a complaint with the Secretary of DOE, who "shall convene an arbitration panel to arbitrate the dispute." The complaint must be accompanied by supporting documents including the decision rendered at the state evidentiary hearing. 34 C.F.R. § 395.13 (a). Similarly, 20 U.S.C. § 107d-1 (b) provides that a state agency which determines that any instrumentality of the federal government having control over federal property is failing to comply with the Act may file a complaint with the Secretary of DOE, who shall convene a panel to arbitrate the dispute.

[4] DOE is authorized, however, to impose a ceiling on the amount of income a licensee may receive from this source. Any excess goes to the state agency. 20 U.S.C. § 107d-3 (a). This limitation on income does not apply where the machines are maintained, serviced, or operated by the licensee, nor does it apply if the machines are in "direct competition" with a vending facility. *Id.* § 107d-3 (b).

In mid-1977 Schlank complained to William W. Thompson, the coordinator of RSA's vending facility program, that she was not receiving the income from vending machines in the building to which she was entitled under section 107d-3 (a) of the Act and that RSA was not making a sufficient effort to collect this income. Although Thompson responded that he was attempting to resolve the situation through negotiation with federal officials, Schlank was dissatisfied with these efforts.[6] She therefore sought a full evidentiary hearing as provided by the Act. Since RSA had failed to promulgate rules for such hearings, a hearing was held under the auspices of the Fair Hearings Division of the Department of Human Resources. *See* D.C. Code §§ 3-210.1 to 210.19 (1988). After a decision in her favor in May of 1978, however, Schlank received a letter from the chief of the Fair Hearings Division stating that it was without jurisdiction to hear the dispute and thus the decision was not binding or enforceable. Schlank was later told by RSA that she and the other vendor in the State Department building would both receive their proper shares of the vending machine income. This apparently resolved the issue.

In June of 1983, Schlank requested permission from RSA to service and stock vending machines in the State Department building. RSA denied this request on July 5, 1984, based in part upon a new RSA regulation or "pro-

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[6] 34 C.F.R. § 395.32 (a) provides that the on-site federal official responsible for the administration of the program shall collect and account for vending machine income. A percentage of that income is then to be collected by the state licensing agency for distribution to the individual vendors. The percentage distributed to the state agency depends on whether or not the machines are determined to be in direct competition with a vending facility operated by a blind vendor. *Id.* § 395.32 (a)-(e).

gram instruction" establishing criteria for vendors wishing to service vending machines. In order to qualify, vendors were required to achieve a certain percentage of gross and net profits from the operation of their vending facilities; these percentages varied depending on the classification of the facility. Schlank's facility was classified as a "snack-bar" and she was unable to meet the applicable percentages. The same criteria were used in determining eligibility for promotions and transfers. Schlank perceived that, under these criteria, only she and the other vendor in the building were excluded from servicing vending machines or being considered for promotion, and that she had been singled out for harassment because of her outspokenness.[6]

Schlank was also involved in a dispute with RSA regarding the right of a blind vendor to incorporate. Despite opinions from DOE that the Act did not prohibit incorporation, RSA threatened Schlank with revocation of her license should she do so. In addition, beginning in 1984 Schlank deducted her legal costs as a business expense from her monthly levy by RSA. The agency questioned whether this was a proper deduction, sought advice from DOE on the subject, and ultimately informed Schlank that it would bill her for "unauthorized" deductions.[7]

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[6] In an earlier incident, on March 28, 1984, Schlank's license had been suspended after RSA received complaints regarding her sale of Playboy and Hustler magazine. Her license was reinstated in April after Schlank threatened legal action.

[7] Schlank was actually informed of this decision by District Enterprises for the Blind (DEB), a nonprofit corporation with whom RSA had contracted to furnish management services to the blind. *See* note 1, *supra*.

On February 15, 1985, Schlank filed a five count complaint in Superior Court against Katherine Williams, the acting administrator of RSA, seeking declaratory and injunctive relief.[8] In count one, Schlank sought a declaratory judgment that RSA had denied her application to service vending machines in the State Department building on the basis of arbitrary and capricious regulations. She further alleged that these regulations were without legal effect because they had not been promulgated in accordance with the District of Columbia Administrative Procedure Act. *See* D.C. Code § 1-1501 (1987). Count two made the same contentions with regard to RSA's regulations governing promotion and transfer opportunities. In count three, Schlank sought a declaratory judgment regarding her right to deduct her legal fees as an operating expense from the monthly administrative levy on her net proceeds. In counts four and five she sought a declaratory judgment or order allowing her to incorporate or, in the alternative, an exemption from and/or a refund of District of Columbia Business Franchise taxes already paid. The parties filed cross-motions for summary judgment.

In a July 16, 1987 order Judge Wagner granted, in part, Schlank's motion for summary judgment and denied that of RSA.[9] With regard to counts one and two, Judge

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[8] Schlank's motion to maintain her suit as a class action was denied on November 15, 1985, by Judge Revercomb.

[9] As a preliminary matter, Judge Wagner considered and rejected the Corporation Counsel's argument that Schlank had failed to exhaust her administrative remedies. Judge Wagner concluded that, under the circumstances of this case, any resort to administrative remedies would have been futile and was therefore excused. Although the Act provides for resolution of disputes in the first instance by resort to a full evidentiary hearing at the state level and, if necessary, by

Wagner found that the program instructions establishing new eligibility requirements for vendors wishing to service vending machines and for transfers and promotions constituted new rules that had not properly been promulgated, and so were without legal effect.[10] Judge Wagner denied summary judgment on count three, reserving for trial the issue of whether legal expenses are deductible when computing a vendor's net proceeds. With regard to incorporation, the judge concluded that neither the Act nor any regulation prohibits a vendor from incorporating, and that RSA could not revoke or threaten to revoke Schlank's license for this action. Finally, count five was certified to the Tax Division of the Superior Court for resolution.[11]

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arbitration before DOE, Judge Wagner found that RSA had failed properly to adopt any procedures for the conduct of such hearings; there were, therefore, no administrative remedies available. In addition, she concluded that pursuant to § 107 (b) (6) of the Act, DOE was not required to convene an arbitration panel where there had been no prior proceedings before the state agency. *See Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 695 F. Supp. 1234, 1240 (D.D.C. 1988) (district court refers to letter from DOE commissioner expressing opinion that, until the District of Columbia promulgates hearing procedures, DOE will decline to entertain arbitration requests). Finally, Judge Wagner rejected the argument that Schlank could have sought a hearing before the District of Columbia Office of Fair Hearings.

[10] The judge reserved for trial the issue of whether "other valid reasons exist for denying plaintiff an opportunity to service vending machines," noting that RSA maintained that space problems and the fact that Schlank and another had filed a joint application necessitated the denial. Before the issue could be tried, however, the parties jointly moved for entry of final judgment. *See* p. 26, *infra*.

[11] This issue was ultimately settled by a compromise agreement filed with the Tax Division.

On November 16, 1987, Schlank filed a motion for attorneys' fees. The motion was denied by Judge Kessler in a March 9, 1988 order on the ground that the Act makes no provision for attorneys' fees and thus, under the "American Rule", the court was without authority to award them. Although unimpressed by RSA's cooperativeness in dealing with Schlank, Judge Kessler further rejected the argument that RSA's conduct amounted to bad faith or vexatiousness necessary to invoke the court's inherent power to award attorneys' fees.

The case was subsequently reassigned to Judge Weisberg who, at a February 8, 1988 status conference, directed that the parties file cross-motions for summary judgment on the deductibility issue in count three, the only remaining count. In a May 31, 1988 order Judge Weisberg granted RSA's motion for summary judgment on the ground that DOE's and RSA's interpretation of the Act as prohibiting the deduction of legal expenses from a vendor's net proceeds was reasonable in light of the purposes of the Act.

In an order dated August 30, 1988, the court entered final judgment incorporating the orders of Judges Wagner, Kessler, and Weisberg. Schlank now appeals from Judge Weisberg's order holding that legal fees are not deductible as a business expense under the Act, and from Judge Kessler's order denying her motion for attorneys' fees.

III.

A. Deductibility of Legal Expenses

A blind vendor's net proceeds from the operation of a vending facility are used as a basis for determining the amount of the administrative levy each vendor is assessed. 20 U.S.C. § 107b (3). Although not defined in the Act,

"net proceeds" are defined by regulations as "the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to blind venders after deducting the cost of such sale *and other expenses* . . . ." 34 C.F.R. § 395.1 (k) (emphasis added).

In a 1984 letter responding to an inquiry from RSA as to whether these "other" deductible expenses included local taxes and legal fees incurred by a vendor in operating a vending facility, the regional commissioner of the Rehabilitation Services Administration of DOE, Ralph N. Pacinelli, interpreted the regulations as prohibiting the deduction of legal fees. Pacinelli stated:

> With regard to the use of gross profit to pay business taxes and legal fees, we provide the following understanding. The D.C. Unincorporated Business Franchise Tax is a required business tax which all vendors must pay to maintain their vending facility operations. Therefore, it seems appropriate that such a tax would be covered under the guide for deducting operating expenses, as outlined in the instructions for completing [form] RSA-15 . . . . Pursuant to the above clarification, it appears that legal fees would not be considered required operating expense [*sic*], and therefore could not be charged against gross income. Legal fees acquired by a vendor as a result of a grievance are considered a personal expense and thus the payment should appropriately be the vendor's responsiblity.

In making this determination, the Commissioner relied in part on previously issued instructions for completing form

RSA-15.[12] These instructions stated that the operating expenses to be deducted from gross income

> should include but not be limited to non-reimbursed expenditures by the vendor for state approved purchases of equipment, repairs and maintenance of equipment; merchandise and supplies; wages to stand assistants or relief operators; rent; utilities; various kinds of insurance such as public liability, theft, fire, social security, and workmen's compensation; extermination or pest control services; delivery services; business licenses; state and local taxes and janitorial services.

Based upon this interpretation of legal fees as "personal expenses," RSA refused to allow Schlank to deduct her legal fees as an operating expense.

In her motion for summary judgment, Schlank contended that the fees were incurred to protect her license and while litigating her rights to certain income and business opportunities; they therefore were necessary business expenses which, under basic and normally accepted accounting principles, should be deductible when determining gross and net profits. Since she had been forced to seek legal protection in order to preserve her business interests, she argued, her expenses could not properly be considered "personal".

While acknowledging that Schlank's arguments had force, Judge Weisberg concluded that the agency's less liberal reading of the statute was at least as persuasive,

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[12] Form RSA-15 is an annual survey of concession and vending opportunities available to blind persons under the Act which state agencies are required to complete on a yearly basis. *See* 20 U.S.C. § 107b (4); 34 C.F.R. § 395.38.

and so he deferred to what he considered a reasonable interpretation of the Act by an agency charged with its administration. In so doing, the judge agreed with the agency's argument that if Schlank's interpretation were adopted, it would favor vendors who freely resort to litigation "seeking to vindicate what they believe to be their legal rights, to the possible detriment of all other vendors who would, in effect, be forced to subsidize these activities . . . ." The judge therefore concluded that the agency could fairly characterize legal fees as personal expenditures not deductible as a business expense in computing the net proceeds subject to levy.

In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984), the Supreme Court held that where an administrative agency has construed a statute with regard to an issue upon which Congress has not spoken, the only question for a reviewing court is whether that interpretation reflects a permissible and reasonable construction of the statute. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the one the court would have reached if the question had arisen in a judicial proceeding." *Id.* at 843 n.11. This court follows the same principle. *E.g.*, *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverages Control Board*, 567 A.2d 1319 (D.C. 1989) (this court "should defer to any reasonable construction of a statute even if our interpretation would be different"); *District of Columbia Dep't of Corrections v. Teamsters Local No. 246*, 554 A.2d 319, 323 (D.C. 1989) (court will defer to a reasonable interpretation of a statute by an agency charged with its enforcement if the reading is not inconsistent with the statute itself); *Hager v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 475 A.2d 367, 368 (D.C. 1984) (same). Thus, the court's

role is not to substitute its construction of the statute for that of DOE and followed by RSA, but to determine whether, in the context of the Randolph-Sheppard program, that interpretation was a reasonable one. We conclude that it was.

On appeal Schlank relies primarily on the argument that, since it is "black letter law" that legal fees incurred by a *taxpayer* in the course of operating a business are deductible business expenses for both federal and state taxation purposes, *see* 26 U.S.C. § 162 (a) (1988); D.C. Code § 47-1803.3 (a) (1) (1987), it was unreasonable for RSA to deny her the same deduction for the purposes of the administrative levy.[13] In construing the Act, however, neither DOE nor RSA was bound by the normal classification of legal expenses for taxation purposes.[14] They were free to reach a different result that was reasonable and consistent with the Act itself.

The administrative levy assessed against the net proceeds of vendor sales is very different from an ordinary tax. The levy is placed into a fund for the exclusive benefit of participating vendors, including appellant, where it is used for such things as health insurance, paid sick leave, vacation time and a guaranteed minimum income to operators of vending facilities. 20 U.S.C. § 107b (3). As structured by the Act, the levy is an accommodation between a key purpose of the Act of "stimulating the blind

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[13] Although appellant appears to argue initially that "the intent of Congress is clear" in supporting her interpretation, she provides no support for this contention nor can we find any. Neither the plain language nor anything in the legislative history unambiguously answers the question presented.

[14] Of course, nothing in the Act prevents Schlank or any other blind vendor from deducting legal fees as a business expense on their federal and District of Columbia tax returns.

to greater efforts in striving to make themselves self-supporting," 20 U.S.C. § 107 (a), and a recognition that in important respects the unsighted vendor still requires a governmental "safety net." Hence, for example, while levied funds *must* be set aside to subsidize needy vendors (to "[a]ssur[e] a fair minimum of return to vendors"), they *may* be set aside for items such as pension funds, health insurance, and paid vacation time only if a majority of the licensed vendors so agree. *See* 34 C.F.R. § 395.9 (b). This delicate balance in the Act between vendor autonomy and residual dependency on government support demonstrates that the levy serves purposes quite distinct from a general tax assessment, and so its collection without allowance for deduction of legal expenses is not, as appellant maintains, a penalty against vendors who assert self-sufficiency by pursuing their legal rights. Schlank may be correct that her struggle with the agency has yielded results beneficial ultimately to all licensed vendors, but we cannot hold unreasonable the agency's conclusion that deductibility of expenses that in the main are a matter of personal choice and not incurred by all vendors would risk depleting the fund at the expense of the beneficiary class in general.[15]

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[15] In his letter to RSA, Commissioner Pacinelli expressed the view that since the D.C. Unincorporated Business Franchise Tax was "a required business tax, . . . it seems appropriate that [it] would be covered under the guide for deducting operating expenses . . . ." Legal fees, by contrast, were not a "required" operating expense and could not be charged against gross income. Schlank erroneously interprets this to mean that, in DOE's view, an operating expense, to be deductible, must be one required by law. If this were true, Schlank would be correct that the agency's interpretation is internally inconsistent, since many of the deductible expenses listed in the instructions for completing form RSA-15 —such as janitorial services—are not required by law. We

Because DOE's interpretation of the Act and regulations and RSA's reliance on that interpretation were reasonable and consistent with the Act itself, *District of Columbia Dep't of Corrections v. Teamsters Local No. 246, supra*, 554 A.2d at 323, we must affirm the grant of summary judgment.

B. Attorneys' Fees

Generally, under the "American Rule," absent express statutory authorization or a contractual provision, each party is responsible for its own attorneys' fees. *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28, 35 (D.C. 1986); *Trilon Plaza Co. v. Allstate Leasing Corp.*, 399 A.2d 34, 37 (D.C. 1979); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 254-57 (1975). Unless the legislature has made "specific and explicit provisions for the allowance of attorneys' fees," *Alyeska*, 421 U.S. at 260, or there is "clear support" in the language or legislative history of a statute for such an intent, *Summit Valley Industries, Inc. v. Local 112, United Bhd. of Carpenters and Joiners of America*, 456 U.S. 717, 726 (1982), no statutory basis for an award of attorneys' fees exists.

There are, at the same time, several recognized exceptions to the American Rule, one of which is claimed to be relevant here. As a matter of inherent equitable authority, a court may award attorneys' fees when the other party "has 'acted in bad faith, vexatiously, wan-

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conclude, however, that Pacinelli's use of the word "required" referred to those expenses necessary to keep a business running on a day-to-day basis, and not merely to expenses required by law. The refusal to allow a deduction for legal expenses, therefore, is not inconsistent with Pacinelli's interpretation, nor is the classification of legal fees as "personal" unreasonable when compared to those business expenses listed.

tonly, or for oppressive reasons.'" *Alyeska, supra,* 421 U.S. at 258-59 (quoting *F.D. Rich Co. v. United States,* 417 U.S. 116, 129 (1974)); *Synanon, supra,* 517 A.2d at 36-37. The intent of this exception is not to compensate worthy litigants but to "'deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.'" *Synanon, supra,* 517 A.2d at 37 (citation omitted). Consistent with its purpose, however, the exception "applies only in extraordinary cases," *Launay v. Launay,* 497 A.2d 443, 450 (D.C. 1985); *Andrews v. District of Columbia,* 443 A.2d 566, 569 (D.C.), *cert. denied,* 459 U.S. 909 (1982), "or when dominating reasons of fairness so demand." *Synanon, supra,* 517 A.2d at 37.

Appellant seeks attorneys' fees under both the Randolph-Sheppard Act and the bad faith exception.

1. Statutory entitlement to fees

Appellant asserts that the Randolph-Sheppard Act itself contemplates an award of attorneys' fees to a vendor wronged by state agency action. As Judge Kessler correctly pointed out, however, the Act "simply does not provide anywhere in its language for the award of counsel fees." Nor has appellant pointed to legislative history manifesting a clear intent of Congress to allow for fees. Instead, appellant relies exclusively on federal appellate decisions, chief of which is *Delaware Dep't of Health and Social Services v. United States Dep't of Educ.,* 772 F.2d 1123 (3d Cir. 1985), in which the court upheld an arbitration panel's award of attorneys' fees against the state of Delaware.

In *Delaware* a vendor licensed under the Act, having been passed over for appointment to a management position in violation of a state regulation, requested and re-

ceived a full evidentiary hearing before a state hearing examiner. *Id.* at 1132. The examiner ordered that the vendor be appointed to the management position and awarded him a portion of his legal fees but disallowed $1,254 of those expenses. *Id.* An arbitration panel convened by DOE then awarded the vendor the $1,254 disallowed by the state examiner. *Id.* at 1134. On appeal from the arbitrator's decision, the district court overturned the arbitrator's award on the ground that it contravened the American Rule. *See Delaware Dep't of Health and Social Services v. United States Dep't of Educ.*, 592 F. Supp. 1038 (D. Del. 1984). The court of appeals reversed. Although the court endeavored to narrow the scope of the question before it to "whether the arbitrators, who concluded that the $1,254 request was reasonable, acted arbitrarily, or capriciously, abused their discretion, or committed legal error in holding that the additional fees should be awarded," *Delaware, supra*, 772 F.2d at 1138, it nevertheless held broadly that an award of attorneys' fees is appropriate under the Randolph-Sheppard Act as an element of compensatory damages for breach of contract. *Id.* at 1139. The court reasoned that by undertaking to administer the Randolph-Sheppard program on the state level and agreeing to cooperate with DOE in carrying out the purposes of the Act, *see* 20 U.S.C. § 107b (1), a state enters a contractual relationship with the federal government to which licensed vendors are third-party beneficiaries. While acknowledging that the attorneys' fee question was "a close one," the court concluded:

> [T]he overall scheme strongly suggests that the states must undertake *to make blind vendors whole* for breaches of the contractual obligations imposed on them by virtue of participation in the Federal Blind Vendors Program . . . . [A]n

> award of attorneys' fees as contract damages is, in this unique circumstance, an appropriate means to that end. Delaware has not met its burden of showing that the broad *make-whole* powers of the arbitration panel in this contractual situation did not include the power to award such fees.

Id. at 1139-40 (footnote omitted; emphasis added).

Appellant contends that although the fees at issue in *Delaware* were incurred during a state-level administrative hearing, the same rationale applies to her suit in Superior Court. RSA's failure to adopt procedures for full evidentiary hearings, she argues, *see* note 9, *supra*, left her with no alternative but to bring this action in Superior Court, which was the equivalent of both the hearing and the DOE arbitration that had been denied her by RSA. Thus, under the rationale of *Delaware*, the trial court was free to fashion a remedy that included reasonable attorneys' fees.

Judge Kessler rejected this argument and distinguished *Delaware* on the ground that, since the issue of statutory authority for a fee award was not contested there, the court never decided the issue of whether the Act allows for an award of attorneys' fees. The judge also recognized, however, quoting the Third Circuit's opinion, that the question "the court did deal with was 'whether, as a matter of federal law, attorneys' fees are an appropriate element of damages for breach of contract between a blind vendor and a Randolph-Sheppard state licensing agency.' " In reversing the district court, the court in *Delaware* expressly held that an award of attorneys' fees against state agencies is proper under the Randolph-Sheppard Act as part of a "make-whole" remedy for "breaches of contractual obligations imposed on them by

virtue of participation in the Federal Blind Vendors Program." *Delaware, supra*, 772 F.2d at 1139. Thus it is problematical, at least, to say that the court never considered whether fees could be awarded under the Act.

Nevertheless, we agree with Judge Kessler that the differences between *Delaware* and this case are significant. At bottom the court in *Delaware* ruled as it did because it could find nothing in the history of the Act revealing an intent to limit the traditionally "broad make-whole powers of [an] arbitration panel" under federal law. *Id.* at 1140.[16] Only by analogy can the proceedings in Superior Court in this case be said to have mirrored the arbitration panel's decision in *Delaware*. Even if the parallel were exact, however, we would decline to follow the result reached in that case for the following reason.

In *F.D. Rich Co. v. United States, supra*, the Supreme Court, in denying an award of attorneys' fees, recognized the logic that unless fees are awarded the "party who must bear the costs of his attorneys' fees out of this recovery is not made whole." *Id.* at 129. Notwithstanding this fact, in the absence of express language or clear evidence of congressional intent, the Court declined to read the Miller Act, 40 U.S.C. §§ 270a *et seq.*, as permitting an award of attorneys' fees. Similarly, in *Summit Valley Industries, Inc. v. Local 112, supra*, the Court assumed for argument's sake that "Congress plainly intended Section 303 [of the Labor Management Relations

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[16] *See, e.g., Delaware, supra*, 772 F.2d at 1130 ("No witness in hearings on S. 2581, and no member of Congress ever suggested that the scope of relief which could be awarded in . . . arbitration proceedings [under the Act] was in any degree different than that available in other arbitration proceedings").

Act] to be *fully* remedial and to restore to the victimized employer *all . . . losses*" (emphasis by Court), but held that "this justification is not sufficient to create an exception to the American Rule in the absence of express congressional authority." *Id.* The conclusion seems inescapable, therefore, that the Supreme Court has rejected the same argument of a "make-whole" remedy implicit in a statute otherwise silent on the fee issue that persuaded the *Delaware* court to sustain an award of attorneys' fees under the Act.[17] Judge Kessler correctly found that there is no statutory basis for an award of attorneys' fees in this case.[18]

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[17] Although the court in *Delaware* noted that it was dealing with an award of fees compensating not for costs in an arbitration proceeding, but rather for costs at the state hearing level, it cited a written DOE policy purportedly construing 20 U.S.C. § 107d-2 (d) (which requires DOE to pay "all reasonable costs to arbitration") so as to require the Secretary to pay attorneys' fees in arbitration proceedings for a vendor unable to afford them. 772 F.2d at 1138 n.13. We have examined that policy ("Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5 (b) and 6 of the Randolph-Sheppard Act as Amended," dated February 3, 1978), and by its terms it appears to hold the very opposite. Two versions of the Revised Interim Policies are extant, both issued the same date. One contains a provision, ¶ 16 (e), permitting payment of reasonable fees for legal expenses in the arbitration proceeding, but it is lined through as deleted. The second version, obviously reflecting the deletion, contains no paragraph 16 (e) and no provision for legal expenses. Evidently for this reason, appellant does not rely on any such policy directive of DOE or the "costs" provision of the Act, § 107d-2 (d), but rather on the make-whole remedy which the Third Circuit found implicit in the Act.

[18] Judge Kessler also accurately distinguished *Almond v. Boyles*, 792 F.2d 451 (4th Cir. 1986). Neither that case nor

2. The bad faith exception

Appellant also argued to the trial court that attorneys' fees were appropriate because of RSA's bad faith and oppressive conduct both before and during the litigation. Judge Kessler took note of appellant's claim that "the long and convoluted history of this lawsuit and events leading up to its filing establish the obduracy and bad faith which would provide justification . . . for an award of counsel fees," but stated nevertheless:

> While the Defendants have not been a model of timely bureaucratic action, and while they have not demonstrated any great eagerness to accommodate the claims of the Plaintiff, the Court does not find that their conduct—and specifically their post-litigation conduct—rises to the level of vexatiousness or bad faith which must be shown to justify an award of attorneys fees under this exception to the American Rule. In short the court cannot conclude that the claims and litigation posture of the defendants "is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons," *Synanon Foundation, Inc. v. Bernstein, supra*, 517 A.2d at 40.[19]

The trial court's finding that RSA's post-litigation actions did not amount to the "extraordinary circumstances"

McNabb v. United States Dep't of Educ., 862 F.2d 681 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 55 (1989), adds support to appellant's statutory argument.

[19] The court noted that this language from *Synanon* referred to the test for determining whether a suit has been *initiated* in bad faith, but found no reason why the same test should not apply in determining whether the suit was *later litigated* in bad faith.

necessary to invoke the bad faith exception is amply supported by the record and applicable authorities. Although a trial court's decision to award or deny attorneys' fees is reviewed for abuse of discretion, *Synanon, supra*, 517 A.2d at 38; *Trilon Plaza Co., supra*, 399 A.2d at 38, the predicate finding of bad faith *vel non* is a factual one which we review under the clearly erroneous standard. D.C. Code § 17-305 (a) (1989);[20] *American Federation of State, County and Municipal Employees v. Ball*, 439 A.2d 514, 515 (D.C. 1981) (award of attorneys' fees must be affirmed "unless, after addressing the facts underlying the award, we find that the trial court abused its discretion"). *See also Simpson v. Chesapeake & Potomac Tel. Co.*, 522 A.2d 880, 885 (D.C. 1987) (trial court's implicit finding under Super. Ct. Civ. R. 11 "that the pleadings were filed in bad faith was not clearly erroneous"); *United Food and Commercial Workers, Local 400 v. Marval Poultry Co.*, 876 F.2d 346, 350-51 (4th Cir. 1989); *Bulgo v. Munoz*, 853 F.2d 710, 714 (9th Cir. 1988). In *Synanon*, this court imposed a heavy burden on a party alleging that an action has been brought or litigated in bad faith, so as "to avoid penalizing a party for a legitimate exercise of the right of access to the courts," or for maintaining an aggressive litigation posture and asserting all colorable claims or defenses. 517 A.2d at 37.

Appellant did not meet this burden. She argued that RSA's bad faith was shown by its action in barring her attorney from certain meetings where challenged regulations were being discussed, frustrating her discovery requests by requiring her to file a motion to compel release

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[20] "Generally, the factual record must be capable of supporting the determination reached by the trial court" in exercising its discretion. *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979).

of documents, and attempting to delay the proceedings and bankrupt appellant by submitting "hypertechnical" pleadings.[21] In response, RSA contended that any meetings from which Schlank's attorney had been barred were not open to the public since no official action was being taken at them. Although the trial court ultimately ruled that Schlank's attorney could not be barred from these meetings as an agent and representative of Ms. Schlank, it made no finding that the meetings were indeed public or that RSA's position was unreasonable or asserted in bad faith. With regard to the motion to compel discovery, RSA noted that the motion had been withdrawn shortly after being filed when the requested documents were produced. Lastly, concerning the argument that the pleadings were hypertechnical, the trial court made no finding that any of appellee's positions were groundless or asserted for the purpose of delay. All told, the trial court could properly find, as she did, that RSA's actions amounted to an aggressive litigation strategy but not the bad faith and deliberate oppressiveness necessary to satisfy the equitable exception.

Somewhat more troubling is Schlank's argument that attorneys' fees were justified by RSA's obdurate and dilatory conduct at the administrative level when she repeatedly, and unsuccessfully, sought to reconcile her

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[21] Appellant refers in the latter connection to RSA's argument before Judge Wagner that appellant had failed to name the proper parties in her complaint. Although the claims were mainly for injunctive relief against District of Columbia officials in their official capacities, Schlank had identified the parties only by title without identifying them by name. The trial court concluded that "to the extent the official office holders involved must be identified by name as well as by title, amendment to clarify the identities of the parties is appropriate," and that such an amendment would not be prejudicial to the defendants.

differences with the agency informally. Judge Kessler found that Schlank had been "trying for ten years to obtain permission from the District of Columbia bureaucracy to service vending machines in the State Department," and that even after she had prevailed on "several significant legal issues" before Judge Wagner, she was still "meet[ing] with delay, foot dragging, and roadblocks from the District Government."[22] Nevertheless, the judge was unable to conclude that appellant's allegations met the "'necessarily stringent" standards of the bad faith exception. *Synanon, supra*, 517 A.2d at 28. Mindful of our limited scope of review of this factual determination, we must affirm it as well.

There is debate among the federal courts over whether the bad faith exception applies to *pre*-litigation conduct. *Compare*, for example, *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 57-58 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979 (1976), *with Shimman v. International Union of Operating Engineers Local 18*, 744 F.2d 1226 (6th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1215 (1985).[23] In *Synanon*, this court pointed out that "the bad faith exception is intended to punish those who have abused *the judicial process* and to deter those who would do so in the future." 517 A.2d at 37 (emphasis added). On the other hand, in *Andrews v. District of Columbia, supra*, we cited several cases for the principle that "an award of attorneys' fees is warranted '[w]here an individual is *forced to seek* judicial

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[22] *See* Memorandum-Order of January 14, 1988, at 1.

[23] In part, the debate is over how much can be read into the Supreme Court's statement in *Hall v. Cole*, 412 U.S. 1, 15 (1973), that "bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation."

assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention . . . .' " 443 A.2d at 569 (emphasis added), quoting *Harkeem v. Adams*, 117 N.H. 687, 691, 377 A.2d 617, 619 (1977). *See also Cahn v. Antioch University*, 482 A.2d 120, 133 (D.C. 1984) (fees appropriate "where a party . . . withholds action to which the opposing party is patently entitled, as by virtue of a judgment or because of a fiduciary relationship, and does so in bad faith"). We shall assume, without deciding, that on a proper showing appellant would have been entitled to attorneys' fees for the pre-litigation conduct of RSA.

Schlank argues that the agency's conduct in resisting her effort to incorporate and in threatening her with license revocation if she did so met the necessary standard. She points to a series of letters from the Regional Commissioner of DOE to RSA in which, after originally stating that the Randolph-Sheppard legislation did not encourage or provide for incorporation, he changed his mind and twice stated that the Act did not prohibit that form of doing business. We agree with appellant that the agency had little practical justification for warning her against incorporation in light of these letters, but we cannot say that her right to incorporate in accordance with the Act was "clearly defined and established" when the agency adhered to its contrary position.[24] Certainly it was not clear "by virtue of a judgment," *Cahn, supra; see Harkeem v. Adams, supra* (agency determination of ineligibility for unemployment benefits overturned by court; agency thereafter "used the same [rejected] rationale to dis-

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[24] RSA's concern apparently was that allowing a vendor to be licensed and to subcontract to a corporation could adversely affect RSA's collection of the administrative levy and its ability to ensure compliance with the terms of the license.

qualify the appellant from benefits"); *Shull v. Columbus Municipal Separate School Dist.*, 338 F. Supp. 1376 (N.D. Miss. 1972) (also cited in *Andrews, supra*) (school board denied admission to unwed mother despite fact court had twice held that policy unconstitutional). Nor can we say that RSA's adoption of new criteria for vendors wishing to service vending machines—which appellant asserts was directed "with surgical precision" at herself and the only other State Department vendor—compels a conclusion that the agency was motivated by an intent to punish her for past assertion of her rights. In granting partial summary judgment for Schlank, Judge Wagner specifically reserved for trial the "factual dispute as to the reason plaintiff had been denied the request to service vending machines," noting that RSA contended there were other reasons besides the new criteria why it was necessary to deny plaintiff's application. The issue was never tried, however, because in August 1988 the parties jointly moved for entry of final judgment, asserting that RSA had agreed to submit to the U.S. General Services Administration on plaintiff's behalf a request to permit her to service vending machines in the State Department. Thus, the issue of whether RSA had valid, non-pretextual reasons for originally resisting appellant's request was mooted by the parties' consent. In these circumstances Judge Kessler cannot be faulted for finding that the obstacles the agency had placed in the way of Schlank's effort to obtain the servicing right were not retaliatory and evidence of bad faith.

* * * *

Ms. Schlank has fought aggressively over the years to obtain what she believed she was entitled to under the Act. In large measure she has been successful. It is also fair to infer that, along the way, she has been felt as a thorn in the side by the bureaucracy, which in turn has

not responded with alacrity to her requests. Nevertheless, although the trial court correctly applauded what appellant's counsel terms her indomitable spirit, we conclude that we may not relax either the bad faith exception or the limits on appellate review in this context to charge the government with her legal expenses and so provide a recompense which Congress has seen fit to withhold.

Accordingly, the judgment and order of the Superior Court are

Affirmed.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

CIVIL I—*JUDGE WAGNER*
Civil Action No. 1164-85

BILLIE R. SCHLANK

Plaintiff

v.

ACTING ADMINISTRATOR, REHABILITATION SERVICES, ADMINISTRATION

and

DIRECTOR OF DEPARTMENT OF FINANCE AND REVENUE GOVERNMENT OF D.C.

Defendants

ORDER GRANTING, IN PART, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND CERTIFYING CERTAIN ISSUES TO THE TAX DIVISION

For the reasons stated in the Memorandum Opinion attached hereto and filed herein on July 16, 1987, it is by the Court this 16th day of July, 1987,

ORDERED and ADJUDGED:

1. That plaintiff's motion for summary judgment be granted, in part, and denied, in part, consistent with this opinion and as specifically set forth below.

2. That defendants' motion for summary judgment be, and hereby is denied.

3. That plaintiff be, and hereby is granted leave to amend the caption and clarify the parties sued by adding the names of the persons holding the positions indicated in the caption and filing appropriate pleadings to that effect on or before July 31, 1987.

4. That judgment is hereby entered declaring *Program Instruction*, RSA (D.C.) P.I. 84-17, paragraph 1.A. through G (August 20, 1984) and *Program Instruction*, RSA (D.C.) P.I. 84-23, 4. (1) and (2) of no effect.

5. That RSA is enjoined from refusing to allow plaintiff to apply to service vending machines solely on the basis of the program instructions which it has failed to promulgate in accordance with the D.C. APA.

6. That judgment is hereby entered declaring that plaintiff is not precluded from incorporating her business by law or regulations governing the Randolph-Sheppard program, and defendant is enjoined from threatening plaintiff's license or terminating same merely because of her efforts to incorporate her business under the laws of the District of Columbia; **PROVIDED,** however, that nothing herein contained shall be construed to relieve plaintiff of the requirements and obligations she must meet personally under the program.

7. That the issues raised by the instant motions and specified in section III. c. of this opinion are hereby certified to the tax division for resolution in accordance with the procedures set forth in *Andrade v. Jackson*, 401 A.2d at 994.

8. In all other respects, the cross motions of the parties for summary judgment are hereby denied and the non-tax issues which remain are reserved for trial in the civil division. (This case is assigned to Civil I, Calendar A).

/s/ A. Wagner
JUDGE
Signed in Chambers

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CIVIL I—*JUDGE WAGNER*
Civil Action No. 1164-85

BILLIE R. SCHLANK

Plaintiff

v.

ACTING ADMINISTRATOR, REHABILITATION SERVICES, ADMINISTRATION

and

DIRECTOR OF DEPARTMENT OF FINANCE AND REVENUE GOVERNMENT OF D.C.

Defendants

MFLD

JUL 16 1987

MEMORANDUM OPINION AND ORDER GRANTING, IN PART, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND CERTIFYING CERTAIN ISSUES TO THE TAX DIVISION

This matter is before the Court upon plaintiff's Motion for Summary Judgment, defendants' opposition thereto and Cross-Motion for Summary Judgment, plaintiff's reply and opposition to defendants' cross-motion, the points and authorities in support of the parties' respective positions, and supplemental memoranda filed by both sides. Upon consideration of same, and having heard and considered the arguments of counsel for the parties, the Court concludes that plaintiff's motion must be granted, in part, and

denied, in part, and that defendant's motion must be denied for the reasons set forth herein.

This action was commenced by plaintiff on her own behalf and all other members of a class similarly situated for injunctive relief and a declaratory judgment with respect to the rights of blind vendors under the Randolph-Sheppard Act, 20 U.S.C. §§107 *et seq.* (1984 Supp.) and under Federal and District of Columbia regulations implementing that Act. Plaintiff's Motion to Maintain Class Action was denied by the Court on November 15, 1985. Plaintiff's individual claims remain pending. Specifically, plaintiff seeks a declaratory judgment or an order to her rights: (1) to operate, service and maintain vending machines in a certain building; (2) to have her stand properly classified for purposes of promotion and transfer; (3) to deduct legal fees as an operating expense before imposition of an administrative levy on her income; and (4) to incorporate and operate her blind vendor's stand as a corporation and/or to be exempt from payment of the District of Columbia business franchise tax and/or for a refund of taxes already paid.[1]

The defendants are identified as follows:

Acting Administrator
Rehabilitation Services Administration
Department of Human Services
Government of the District of Columbia

and

Director, Department of Finance and Revenue
Government of the District of Columbia

Plaintiff claims that the Acting Administrator of the Rehabilitation Services Administration (RSA) has acted ar-

[1] The relief requested in no. 4 was not originally prayed in the alternative. Plaintiff's subsequent pleadings indicate that both remedies are not sought.

bitrarily, capriciously and contrary to law in administering the Randolph-Sheppard Act resulting in plaintiff's deprivation of her rights under it. Plaintiff contends that the inconsistent interpretations of the law by RSA and the Director, Department of Finance and Revenue have resulted in the imposition of a tax upon her from which she should be exempt.

The Corporation Counsel for the District of Columbia filed an answer on behalf of the defendants contending, *inter alia*, that plaintiff failed to exhaust administrative remedies, that the Court lacks subject matter jurisdiction, that defendants are not *sui juris*, that defendants' actions were in good faith and consistent with the purposes of the Randolph-Sheppard Act and other applicable law, and that plaintiff's claims are non-justiciable.

* * *

II. *Exhaustion of Administrative Remedies*

Defendants contend that the complaint should be dismissed because plaintiff has failed to exhaust her administrative remedies. The general rule is that available administrative remedies must be exhausted before judicial relief may be obtained. *Andrade v. Lauer*, 234 U.S. App. D.C. 384, 393 (1984). The Randolph-Sheppard Act requires that the state licensing agencies responsible for administering the program agree to provide an aggrieved blind licensee an opportunity for a fair hearing and to submit any grievances not resolved by such hearing to arbitration as provided under the Act. 20 U.S.C. §107(b)(6). Under 20 U.S.C. §107(d)-1(a),

> Any blind licensee who is dissatisfied with any action arising from operation or administration of the vending facility program may submit to a state licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107(b)(6) of this title.

Although the language of section 107(d)-1(a) is permissive, the provision has been interpreted to be mandatory. *Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336, 338 (6th Cir. 1978). Whether the administrative and arbitration remedies under the Randolph-Sheppard Act are mandatory or permissive has not been decided in this jurisdiction. *See Randolph-Sheppard Vendors of America v. Weinberger*, 602 F. Supp. 1007, 1015 (D.D.C. 1985). It was not necessary to resolve the question in the *Weinberger* case; however, the Court did observe that there are differing views on the subject. *Id.* It is not necessary to resolve the issue for purposes of determining whether plaintiff is precluded from seeking judicial relief because of her failure to exhaust administrative remedies. For plaintiff has shown exceptional circumstances exist which would eliminate any exhaustion requirement in this case.

One is not required to resort to administrative procedures when to do so would be futile. *Apartment & Office Building Association of Metropolitan Washington v. Washington*, 343 A.2d 323, 332 (D.C. 1975). With the exception of plaintiff's alternative claim for refund of taxes already paid, plaintiff's claims would be appropriate for initial consideration under the administration and arbitration procedures contemplated by the Randolph-Sheppard Act. However, the District of Columbia has failed to adopt such procedures. Hearing procedures established by D.C. agencies must be formulated and adopted pursuant to the requirements of the D.C. Administrative Procedure Act as set forth in the D.C. Code §1-1501 *et seq.* (1981 ed.). D.C. Code §1-1506 requires each agency to publish in the D.C. Register for the guidance of the public, notice of the intended action before any rule is adopted. Except in emergency situations, no rule can be adopted unless prior notice of the intended action is published in the District of Columbia Register. D.C. Code §1-1506(a). Although emergency regulations may become effective prior to publication, no such rule can remain in effect longer than

120 days after the date of its adoption. D.C. Code §1-1506(c). Emergency procedures for evidentiary and administrative review under the Randolph-Sheppard Act were adopted by the District of Columbia. Such procedures took effect on March 24, 1982 and expired July 22, 1982.[6] Regulations pertaining to the blind vendors program appear in 29 DCMR Public Welfare Chapter 2 (September 1985) which indicate that hearing procedures under the Randolph-Sheppard Act, "shall be published separately by the Department." 29 DCMR 2-11, section 215.4 (September 1985).[7] Defendants have cited, and the Court could find no such publication. The District does not contend that any other procedures were adopted in accordance with D.C. Code §1-1506 to replace the expired emergency measures. Therefore, no administrative remedy was in existence to hear grievances of blind vendors under the Randolph-Sheppard Act.

It is the District's position that plaintiff could have had a hearing before the Office of Fair Hearings which was established under D.C. Code §3-210.1 *et seq.* (1986 Cum. Supp.). The Corporation Counsel points out that the regulations governing the Office of Fair Hearings were published in the D.C. Register. The Office of Fair Hearings was established to hear grievances of applicants or recipients of public assistance. As used in the applicable statute, public assistance means "payment in or by money, medical care, remedial care, goods or services to, or for the benefit of, needy persons." D.C. Code §3-201.1 (1986 Cum. Supp.). While blind persons may be entitled to public assistance benefits under this statute, the opportunity to earn income from employment under the Randolph-Sheppard Act is a different and distinct program. The administrative remedies afforded through the Office of Fair Hearings was not

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[6] See Attachment 8 to Plaintiff's Memorandum of Points and Authorities in support of Motion for Summary Judgment.

[7] See Exhibit C to Defendants' Supplemental Memorandum.

intended to extend to blind vendors under the Randolph-Sheppard program. This was known when notice of the rules governing the Office of Fair Hearings was published. In the Notice of Proposed Rulemaking giving notice of the intent to adopt hearing procedures for the Department of Human Resources through the Office of Judicial Affairs and Fair Hearings, it was specifically stated that the rules did not apply to hearings under the "Randolph-Sheppard Vending Stand Act (68 Stat. 663, 20 U.S.C. ch.6-A) as amended or other Federal or District Laws which require a different method of review of hearing."[8]

The District could not lodge jurisdiction for evidentiary hearings under the Randolph-Sheppard Act in the Office of Fair Hearings without complying with the rulemaking procedures set forth in the D.C. Administrative Procedures Act, D.C. Code §-1501 *et seq.* (1981 ed.) (D.C. APA). [sic] Under the D.C. APA, rule is defined as follows:

> (6) The term "rule" means the whole or any part of any Mayor's or agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedures, or practice requirements of the Mayor or of any agency.

D.C. Code §1-1502(6) (1981 ed.). Rulemaking refers to the process of the formulation, amendment, or repeal of a rule. D.C. Code §1-1502(7) (1981 ed.). The D.C. APA requires public notice and an opportunity for interested persons to submit their views and other data on the proposed action of an agency. D.C. Code §§1-1506, -1538 (1981 ed.). Absent publication as required, rules of general or particular applicability cannot become effective. *Junghans v. Department of Human Resources*, 289 A.2d 17, 25 (D.C. 1972).

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[8] Department of Human Resources, Notice of Proposed Rulemaking, District of Columbia Register, September 14, 1979.

Blind vendors eligible for opportunities under the Randolph-Sheppard Act were never notified by publication as required of where to address comments on any proposal to establish the Office of Fair Hearings as the administrative arm for providing evidentiary hearings under the Randolph-Sheppard Act. Absent compliance with the notice and publication requirements, no administrative procedure for an evidentiary hearing existed which had any legal effect. D.C. Code §1-1538(b) (1981 ed.). Plaintiff was not required to resort to a hearing before a body which was not vested with jurisdiction to hear her claims. To do so would have been futile.

Other factors support plaintiff's claim of futility in this case. Plaintiff obtained a hearing before the Office of Fair Hearings at an earlier date. After a favorable decision from the hearing officer, plaintiff was informed by the Chief of the Fair Hearings and Regulations Division that the decision was not binding and enforceable because of lack of jurisdiction. After that time, the emergency procedures were set in place which expired on July 22, 1982. Nothing has been established in accordance with the requirements of law to replace the emergency procedures. Therefore, plaintiff had every reason to conclude that it would be futile to seek relief again before a body which has never been granted jurisdiction in accordance with the requirements of law. Plaintiff is not required to rely on a mechanism having no legal effect because RSA has adhered to such procedure in two other cases. The same circumstances exist now which existed when the Office of Fair Hearings disclaimed jurisdiction in plaintiff's earlier case. Arbitration remedies are available only with respect to issues not resolved by the evidentiary hearing required under the Randolph-Sheppard Act. 20 U.S.C. §107(b)(6). Since no evidentiary hearing procedure is available, plaintiff could not seek arbitration of issues unresolved after hearing.

The exhaustion requirement is regarded ultimately as matter of judicial discretion rather than a jurisdictional requirement. *Foundation of Economics Trends v. Heckler*, 244 U.S. App. D.C. 122, 135 (1985); *Andrade v. Lauer*, 234 U.S. App. D.C. 384, 393 (1984); *Barnett v. District of Columbia Department of Employment Services*, 491 A.2d 1156, 1161-1163 (D.C. 1985). The primary purposes of the exhaustion requirement are: (1) to carry out the legislative purpose of the grant of authority to the agency; (2) to allow the agency to apply its own expertise and correct its own errors; (3) to aid judicial review by a development of the facts; and (4) to promote judicial economy by needless repetition of administrative and judicial fact finding. *Andrade v. Lauer*, 234 U.S. App. D.C. at 393. These purposes would not be served by application of the doctrine to the facts of this case. With respect to the first consideration, the legislative agency responsible for administration of the Randolph-Sheppard program has declined to establish an administrative remedy within the agency. The benefits of the second purpose would be lacking even if the Office of Fair Hearings had been designated to hold evidentiary hearings under the Randolph-Sheppard Act through the required publication procedures. The expertise of that body necessarily lies in the area of public assistance programs and not in the area of economic development and opportunities for blind individuals. The benefits of the third and fourth purposes are not significant here. Plaintiff's principle claims involve questions of law and conflicting interpretations of local statutes by different agencies. Such claims could not be resolved through the administrative process even if it existed. This case presents exceptional circumstances which warrant allowing the case to proceed. *See Barnett v. District of Columbia Department of Employment Services*, 491 A.2d at 1163.

In summary, the Court concludes that resort to administrative procedures would have been futile in this case because no administrative remedy existed after the expi-

ration of the emergency procedures in 1982. Accordingly, plaintiff was not required to pursue such a course. *Apartment & Office Building Association of Metropolitan Washington v. Washington*, 343 A.2d at 332. Additionally, the facts of this case offer compelling circumstances for allowing plaintiff to seek judicial relief without further efforts for a hearing at the administrative level. Plaintiff should not be delayed further in seeking judicial relief while defendant endeavors to establish administrative procedures consistent with the requirements of law.

* * *

For all of the foregoing reasons, the following Order and Judgment shall be entered on a separate document:

1. That plaintiff's motion for summary judgment be granted, in part, and denied, in part, consistent with this opinion and as specifically set forth below.

2. That defendant's motion for summary judgment be, and hereby is denied.

3. That plaintiff be, and hereby is granted leave to amend the caption and clarify the parties sued by adding the names of the persons holding the positions indicated in the caption and filing appropriate pleadings to that effect on or before July 31, 1987.

4. That judgment is hereby entered declaring *Program Instruction*, RSA (D.C.) P.I. 84-17, paragraph 1.A. through G (August 20, 1984) and *Program Instruction*, RSA (D.C.) P.I. 84-23, 4. (1) and (2) of no effect.

5. That RSA is enjoined from refusing to allow plaintiff to apply to service vending machines solely on the basis of the program instructions which it has failed to promulgate in accordance with the D.C. APA.

6. That judgment is hereby entered declaring that plaintiff is not precluded from incorporating her business by law or regulations governing the Randolph-Sheppard

program, and defendant is enjoined from threatening plaintiff's license or terminating same merely because of her efforts to incorporate her business under the laws of the District of Columbia; **PROVIDED**, however, that nothing herein contained shall be construed to relieve plaintiff of the requirements and obligations she must meet personally under the program.

7. That the issues raised by the instant motions and specified in section III. c. of this opinion are hereby certified to the tax division for resolution in accordance with the procedures set forth in *Andrade v. Jackson*, 401 A.2d at 994.

8. In all other respects, the cross motions of the parties for summary judgment are hereby denied and the non-tax issues which remain are reserved for trial in the civil division.

Date: July 16, 1987 /s/ A. Wagner
JUDGE
Signed In Chambers

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. 1164-85
JUDGE KESSLER
Civil I

BILLIE R. SCHLANK

Plaintiff,

v.

KATHERINE A. WILLIAMS, ACTING ADMINISTRATOR, REHABILITATION SERVICES ADMINISTRATION, *et al.*,

Defendants.

DOCKETED MAR 09 1988

MEMORANDUM OPINION

This matter is before the Court upon the Motion of Plaintiff, Billie R. Schlank, for an award of attorney's fees and expenses in the amount of $57,834.19. Upon consideration of the Plaintiff's Motion and supporting Memorandum of Law and exhibits, the Opposition of the Defendant District of Columbia, the Plaintiff's Reply to Defendants' Opposition, the Defendants' Memorandum in Opposition to Plaintiff's Reply, the final Reply of Plaintiff, the entire record in this case including the Memorandum Opinion and Order of Judge Annice Wagner of July 16, 1987, the Randolph-Sheppard Act (20 U.S.C. §107 *et seq.* (1984 Supp.)), and the applicable case law, the Court is constrained to

conclude that the Motion must be denied for the following reasons:[1]

1. The so-called "American Rule" provides that litigants shall bear their own litigation expenses including both attorney's fees and costs. *Alyeska Pipeline, Co. v. Wilderness Society*, 421 U.S. 240, 257, 260 (1975). Under that Rule, there is no exception to the prohibition against shifting attorney's fees unless a statute specifically provides for the award of counsel fees or the opponent of a successful party has acted "in bad faith, vexatiously, wantonly or for oppressive reasons . . .," *Hall v. Cole*, 412 U.S. 1, 5 (1973). The law in this jurisdiction was summarized by our Court of Appeals in *1901 Wyoming Avenue Cooperative Association v. Lee*, 345 A.2d 456, 464-465 (D.C. 1975):

> In this jurisdiction, however, it is well settled that counsel fees are not generally allowed the prevailing party either as damages or costs. [citations omitted]. Moreover, the Supreme Court has recently held that federal courts have no authority in the absence of a specific statute to award such fees to attorneys representing successful litigants. [citations omitted]
>
> There are, of course, exceptions. The relevant ones in this action are that where a party brings or maintains an unfounded suit or withholds action to which the opposing party is patently entitled, as by virtue of a judgment or because of a fiduciary relationship, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons,

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[1] In giving leave to Plaintiff to file the present Motion, the Court made *no* rulngs [sic] on the merits either as to the legal authority for granting such a motion under the statute or as to whether Plaintiff had in fact substantially prevailed in the litigation. Suggestions in Plaintiff's papers that such rulings on the merits had been made are incorrect.

reasonable attorneys' fees may be allowed. [citations omitted].[2]

2. There can be no question that the statute in question in this case, the Randolph-Sheppard Act, simply does not provide anywhere in its language for the award of counsel fees. Nor have counsel suggested that there is any legislative history addressing this issue.

3. What counsel for Plaintff relies on are two federal court of appeals opinions, both of which the Court finds unpersuasive for the following reasons.

A. Plaintiff relies most heavily on *Delaware Department of Health and Social Services v. U.S. Department of Education*, 772 F.2d 1123 (3rd Cir. 1985) (hereafter "*Delaware*"). The Third Circuit's holding in that case was extremely narrow and arose in a procedural context which is totally distinguishable from the present case, 772 F.2d at 1138-1140.

Initially it must be noted the issue of *whether* there was statutory authority for an award of counsel fees was not even contested, and therefore not decided, by the Third Circuit. Consequently, there was no discussion whatsoever—and presumably no consideration—by the Court about the basis of its authority for such an award.

Next, the court itself went out of its way to repeatedly emphasize, at pages 1138-1140, both the narrowness of its holding and the fact that it was not deciding certain issues. The sole question before the court was whether the arbitrators acted reasonably or whether they acted arbitrarily, capriciously, abused their discretion, and/or committed legal error, by overruling a hearing examiner's disallowance of a portion of the attorneys fees claimed ($1,254)

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[2] See, most recently, *General Federation of Women's Clubs v. Iron Gate Inn and John Saah*, No. 86-811 and 86-900, slip op at 9 (D.C. February 18, 1988).

and holding that that portion of additional fees should have been awarded. Not only was there no challenge to the underlying statutory authority to award such fees, but there was no challenge to the reasonableness of the $1,254 amount itself. The only question that the court did deal with was "whether, as a matter of federal law, attorney's fees are an appropriate element of damages for breach of contract between a blind vendor and a Randolph-Sheppard state licensing agency," 772 F.2d at 1139. While the Third Circuit concluded that they were, and therefore affirmed the decision of the arbitration panel, that narrow question is not the question posed in the pending lawsuit.

In the present case, Plaintiff has brought a civil lawsuit on behalf of herself and all other members of a class similarly situated for injunctive and declaratory relief. Although the request for class certification was denied at an early stage of the proceedings, Judge Wagner denied the Defendant's Motion for Summary Judgment, certified certain issues to the Tax Division of this Court, declared that Plaintiff has a right to incorporate her business, and declared that Plaintiff was not precluded from seeking judicial relief on the ground of failure to exhaust administrative remedies because no legal and valid administrative remedies existed pursuant to the District of Columbia Administrative Procedure Act, D.C. Code §1-1501 *et seq.* (1981 ed.). Thus, while Plaintiff did indeed prevail on a number of important claims, the present judicial proceedings are very different from the arbitration proceeding for breach of contract under review by the Third Circuit in *Delaware*.

For these reasons the Court finds *Delaware* inapposite to the present case, and therefore not persuasive precedent.

B. Plaintiff also cites *Almond v. Boyles*, 792 F.2d 451 (4th Cir. 1986) in support of her position that the Randolph-Sheppard Act authorizes an award of attorneys fees.

Again, the issue and holding in that case was far narrower than in ours. Again, the issue of *whether* there was statutory authority for an award of counsel fees was not contested, and therefore not decided or considered, by the Fourth Circuit. Consequently, again, there was no discussion whatsoever by the court about the basis of its authority for such an award.

The only issue the court decided was whether the district court had abused its discretion in the actual award of attorneys fees which it made. Concluding that the lower court had applied the wrong standard in calculating the award, the Fourth Circuit reversed and remanded. Given the fact that its opinion contains absolutely no discussion of the very issue at stake in the pending Motion—whether there is statutory authority for the award of counsel fees—this Court does not find itself persuaded by the result.

4. Finally, Plaintiff argues vigorously that the long and convoluted history of this lawsuit and events leading up to its filing establish the obduracy and bad faith which would provide justification, even under the American Rule, for an award of counsel fees. The Court cannot agree.

In *General Federation of Women's Clubs v. Iron Gate Inn, Inc. and John Saah, supra,* slip op. at 9-11 (D.C. February 18, 1988) the Court of Appeals reviewed the relevant case law and delimited the narrow parameters of this exception to the American rule. Noting that the bad faith exception "applies only in extraordinary cases," (*Launay v. Launay, Inc.*, 497 A.2d 443, 450 (D.C. 1985)), the Court pointed out (slip op. at 10):

> 'the bad faith exception is intended to punish those who have abused the judicial process and to deter those who would do so in the future.' *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28 (D.C. 1986). As stated in *Synanon*:
>
> > [T]he court must scrupulously avoid penalizing a party for a legitimate exercise of the

> right of access to the courts. 'A party is not to be penalized for maintaining an aggressive litigation posture nor are good faith assertions of colorable claims or defenses to be discouraged.'
>
> *Id.* at 37 (quoting *Lipsig v. National Student Marketing Corp.*, 214 U.S. App. D.C. 1, 3-4, 663 F.2d 178, 180-81 (1980) (per curiam).

While the Defendants have not been a model of timely bureaucratic action, and while they have not demonstrated any great eagerness to accommodate the claims of the Plaintiff, the Court does not find that their conduct—and specifically their post-litigation conduct—rises to the level of vexatiousness or bad faith which must be shown to justify an award of attorneys fees under this exception to the American Rule.[3] In short the Court cannot conclude that the claims and litigation posture of the Defendants "is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons," *Synanon Foundation, Inc. v. Bernstein, supra*, 517 A.2d at 40.[4]

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[3] The Court's ruling on the legal issues should, in no way, be construed as reflective of its evaluation of the services performed by Plaintiff's counsel. Plaintiff's counsel has tenaciously and vigorously represented his client, and has done legal work of high quality. If the District of Columbia had statutes analagous to any of the many federal statutes which now provide counsel fees to deserving plaintiffs (see for example, Equal Access to Justice Act, 5 U.S.C. §504 (Supp. 1987); Clean Air Act, 42 U.S.C. §7607(f)(1982); Freedom of Information Act, 5 U.S.C. §552(a)(4)(E)(1980); Energy Policy and Conservation Act, 42 U.S.C. §6305(d)(1982); Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. §1988), the Court's rulings would have been both easier and more to its personal liking.

[4] While this particular language in *Synanon* sets forth the test for determining whether an action has been initiated, as opposed to later litigated, in bad faith, there would appear to be no substantial difference in the test to be applied to the two situations.

WHEREFORE, it is hereby this 4th day of March, 1988,

ORDERED: That Plaintiff's Motion for Attorney's Fees is denied.

/s/ Gladys Kessler
GLADYS KESSLER, JUDGE

Dated: March 4, 1987
Copies to:

Sheldon I. Cohen, Esquire
2009 N. 14th Street, Suite 708
Arlington, Virginia 22201
Counsel for Plaintiff

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Counsel for Defendant

APPENDIX D

20 U.S.C. § 107. Operation of vending facilities authorized; preferences regulations; justification for limitation on such operation

(a) For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that—

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this pro-

vision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

§ 107a. Federal and State responsibilities

(a) Functions of Secretary; Surveys; designation of State licensing agencies; qualifications for license; evaluation of programs

The Secretary of Health, Education, and Welfare shall—

(1) Insure that the Rehabilitation Services Administration is the principal agency for carrying out this chapter; and the Commissioner shall, within one hundred and eighty days after enactment of the Randolph-Sheppard Act Amendments of 1974, establish requirements for the uniform application of this chapter by each State agency designated under paragraph (5) of this subsection, including appropriate accounting procedures, policies on the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of set-aside funds under section 107b(3) of this title;

(2) Through the Commissioner, make annual surveys of concession vending opportunities for blind persons on Federal and other property in the United States, particularly with respect to Federal property under the control of the General Services Administration, the Department of Defense, and the United States Postal Service;

(3) Make surveys throughout the United States of industries with a view to obtaining information that will assist blind persons to obtain employment;

(4) Make available to the public, and especially to persons and organizations engaged in work for the

blind, information obtained as a result of such surveys;

(5) Designate as provided in section 107b of this title the State agency for the blind in each State, or, in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by the State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commission,[1] (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and annually submit to the appropriate committees of Congress a report based on such evaluations, and (B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the provisions of this chapter.

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such

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[1] So in original. Probably should read "Commissioner".

licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

(d) Buildings occupied by United States departments, agencies, and instrumentalities required to provide sites for facilities; exceptions

(1) After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is determined by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such

building includes a satisfactory site or sites for a vending facility.

(2) The provisions of paragraph (1) shall not apply (A) when the Secretary and the State licensing agency determine that the number of people using the property is or will be insufficient to support a vending facility, or (B) to any privately owned building, any part of which is leased by any department, agency, or instrumentality of the United States and in which, (i) prior to the execution of such lease, the lessor or any of his tenants had in operation a restaurant or other food facility in a part of the building not included in such lease, and (ii) the operation of such a vending facility by a blind person would be in proximate and substantial direct competition with such restaurant or other food facility except that each such department, agency, and instrumentality shall make every effort to lease property in privately owned buildings capable of accommodating a vending facility.

(3) For the purposes of this subsection, the term "satisfactory site" means an area determined by the Secretary to have sufficient space, electrical and plumbing outlets, and such other facilities as the Secretary may by regulation prescribe, for the location and operation of a vending facility by a blind person.

(e) State licensing agency in States having vocational rehabilitation plans

In any State having an approved plan for vocational rehabilitation pursuant to the Vocational Rehabilitation Act or the Rehabilitation Act of 1973, the State licensing agency designated under paragraph (5) of subsection (a) of this section shall be the State agency designated under section 721(a)(1)(A) of Title 29.

§ 107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree—

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: *Provided, however,* That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license is issued: *And provided further,* That if ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services;

(D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however,* That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

* * *

§ 107d-1. Grievances of blind licensees; hearing and arbitration; noncompliance by federal departments and agencies; complaints by state licensing agencies; arbitration

(a) Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending

facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

§ 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

(b) Composition of panel; designation of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (a)(A), (B), or (C), the Secretary shall designate such member on behalf of such party.

(2) The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such

member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(c) Publication of decisions in Federal Register

The decisions of a panel convened by the Secretary pursuant to this section shall be matters of public record and shall be published in the Federal Register.

(d) Payment of costs by the Secretary

The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses he shall publish in the Federal Register.

* * *

§ 107e. Definitions

As used in this chapter—

(1) "blind person" means a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by

any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Health, Education, and Welfare;

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by blind licensees; and

(8) "vending machine income" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

APPENDIX E

34 CODE OF FEDERAL REGULATIONS (1989)

PART 395—VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL AND OTHER PROPERTY

Subpart A—Definitions

§ 395.1 Terms.

Unless otherwise indicated in this part, the terms below are defined as follows:

(a) "Act" means the Randolph-Sheppard Vending Stand Act (Pub. L. 74-732), as amended by Pub. L. 83-565 and Pub. L. 93-516, 20 U.S.C., ch. 6A, Sec 107.

(b) "Blind licensee" means a blind person licensed by the State licensing agency to operate a vending facility on Federal or other property.

(c) "Blind person" means a person who, after examination by a physician skilled in diseases of the eye or by an optometrist, whichever such person shall select, has been determined to have

(1) Not more than 20/200 central visual acuity in the better eye with correcting lenses, or

(2) An equally disabling loss of the visual field as evidenced by a limitation to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20°.

(d) "Cafeteria" means a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself from displayed selections. A cafeteria may be fully automatic or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating facilities are always provided.

(e) "Secretary" means the Secretary of the Rehabilitation Services Administration.

(f) "Direct competition" means the presence and operation of a vending machine or a vending facility on the same premises as a vending facility operated by a blind vendor, except that vending machines or vending facilities operated in areas serving employees the majority of whom normally do not have direct access (in terms of uninterrupted ease of approach and the amount of time required to patronize the vending facility) to the vending facility operated by a blind vendor shall not be considered to be in direct competition with the vending facility operated by a blind vendor.

(g) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States (including the Department of Defense and the U.S. Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States.

(h) "Individual location installation or facility" means a single building or a self-contained group of buildings. In order for two or more buildings to be considered to be a self-contained group of buildings, such buildings must be located in close proximity to each other, and a majority of the Federal employees housed in any such building must regularly move from one building to another in the course of official business during normal working days.

(i) "License" means a written instrument issued by the State licensing agency to a blind person, authorizing such person to operate a vending facility on Federal or other property.

(j) "Management services" means supervision, inspection, quality control, consultation, accounting, regulating,

in-service training, and other related services provided on a systematic basis to support and improve vending facilities operated by blind vendors. "Management services" does not include those services or costs which pertain to the on-going operation of an individual facility after the initial establishment period.

(k) "Net proceeds" means the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to blind vendors after deducting the cost of such sale and other expenses (excluding set-aside charges require to be paid by such blind vendors).

(l) "Nominee" means a nonprofit agency or organization designated by the State licensing agency through a written agreement to act as its agent in the provision of services to blind licensees under the State's vending facility program.

(m) "Normal working hours" means an eight hour work period between the approximate hours of 8:00 a.m., to 6:00 p.m., Monday through Friday.

(n) "Other property" means property which is not Federal property and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property.

(o) "Permit" means the official approval given a State licensing agency by a department, agency or instrumentality in control of the maintenance, operation, and protection of Federal property, or person in control of other property, whereby the State licensing agency is authorized to establish a vending facility.

(p) "Program" means all the activities of the licensing agency under this part related to vending facilities on Federal and other property.

(q) "Satisfactory site" means an area fully accessible to vending facility patrons and having:

(1) Effective on March 23, 1977 a minimum of 250 square feet available for the vending and storage of articles necessary for the operation of a vending facility; and

(2) Sufficient electrical plumbing, heating, and ventilation outlets for the location and operation of a vending facility in accordance with applicable health laws and building codes.

(r) "Secretary" means the Secretary of Education.

(s) "Set-aside funds" means funds which accrue to a State licensing agency from an assessment against the net proceeds of each vending facility in the State's vending facility program and any income from vending machines on Federal property which accrues to the State licensing agency.

(t) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia.

(u) "State vocational rehabilitation agency" means that agency in the State providing vocational rehabilitation services to the blind as the sole State agency under a State plan for vocational rehabilitation services approved pursuant to the provisions of the Rehabilitation Act of 1973 (29 U.S.C., ch. 16).

(v) "State licensing agency" means the State agency designated by the Secretary under this part to issue licenses to blind persons for the operation of vending facilities on Federal and other property.

(w) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia.

(x) "Vending facility" means automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of newspapers, periodicals, confec-

tions, tobacco products, foods, beverages, and other articles or service dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of changes for any lottery authorized by State law and conducted by an agency of a State within such State.

(y) "Vending machine", for the purpose of assigning vending machine income under this part, means a coin or currency operated machine which dispenses articles or services, except that those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services, machines providing services of a recreational nature, and telephones shall not be considered to be vending machines.

(z) "Vending machine income" means receipts (other than those of a blind vendor) from vending machine operations on Federal property, after deducting the cost of goods sold (including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns, where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind vendor) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

(aa) "Vendor" means a blind licensee who is operating a vending facility on Federal or other property.

(bb) "Vocational rehabilitation services" means those services as defined in § 1361.1(ee) (1) and (2) of this chapter.

Subpart B—The State Licensing Agency

§ 395.2 Application for designation as a State licensing agency; general.

(a) An application for designation as a State licensing agency may be submitted only by the State vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan for vocational rehabilitation services under Part 1361 of this chapter.

(b) Such application shall be:

(1) Submitted in writing to the Secretary;

(2) Approved by the chief executive of the State; and

(3) Transmitted over the signature of the administrator of the State agency making application.

§ 395.3 Application for designation as State licensing agency; content.

(a) An application for designation as a State licensing agency under § 395.2 shall indicate:

(1) The State licensing agency's legal authority to administer the program, including its authority to promulgate rules and regulations to govern the program;

(2) The State licensing agency's organization for carrying out the program, including a description of the methods for coordinating the State's vending facility program and the State's vocational rehabilitation program, with special reference to the provision of such post-employment service necessary to assure that the maximum vocational potential of each blind vendor is achieved;

(3) The policies and standards to be employed in the selection of suitable locations for vending facilities;

(4) The methods to be used to ensure the continuing and active participation of the State Committee of Blind

Vendors in matters affecting policy and program development and administration.

(5) The policies to be followed in making suitable vending facility equipment and adequate initial stock available to a vendor;

(6) The sources of funds for the administration of the program;

(7) The policies and standards governing the relationship of the State licensing agency to the vendors, including their selection, duties, supervision, transfer, promotion, financial participation, rights to a full evidentiary hearing concerning a State licensing agency action, and, where necessary, rights for the submittal of complaints to an arbitration panel;

(8) The methods to be followed in providing suitable training, including on-the-job training and, where appropriate, upward mobility training, to blind vendors;

(9) The arrangements made or contemplated, if any, for the utilization of the services of any nominee under § 395.15; the agreements therefor and the services to be provided; the procedures for the supervision and control of the services provided by such nominee and the methods used in evaluating services received, the basis for remuneration, and the fiscal controls and accounting procedures;

(10) The arrangements made or contemplated, if any, for the vesting in accordance with the laws of the State, of the right, title to, and interest in vending facility equipment or stock (including vending machines), used in the program, in a nominee to hold such right, title to, and interest for program purposes; and

(11) The assurances of the State licensing agency that it will:

(i) Cooperate with the Secretary in applying the requirements of the Act in a uniform manner;

(ii) Take effective action, including the termination of licenses, to carry out full responsibility for the supervision and management of each vending facility in its program in accordance with its established rules and regulations, this part, and the terms and conditions governing the permit;

(iii) Submit promptly to the Secretary for approval a description of any changes in the legal authority of the State licensing agency, its rules and regulations, blind vendor agreements, schedules for the setting aside of funds, contractural arrangements for the furnishing of services by a nominee, arrangements for carrying general liability and product liability insurance, and any other matters which form a part of the application;

(iv) If it intends to set aside, or cause to be set aside, funds from the net proceeds of the operation of vending facilities, obtain a prior determination by the Secretary that the amount of such funds to be set aside is reasonable;

(v) Establish policies against discrimination of any blind vendor on the basis of sex, age, physical or mental impairment, creed, color, national origin, or political affiliation;

(vi) Furnish each vendor a copy of its rules and regulations and a description of the arrangements for providing services, and take adequate steps to assure that each vendor understands the provisions of the permit and any agreement under which he operates, as evidenced by his signed statements;

(vii) Submit to an arbitration panel those grievances of any vendor unresolved after a full evidentiary hearing;

(viii) Adopt accounting procedures and maintain financial records in a manner necessary to provide for each vending

facility and for the State's vending facility program a classification of financial transactions in such detail as is sufficient to enable evaluation of performance; and

(ix) Maintain records and make reports in such form and containing such information as the Secretary may require, make such records available for audit purposes, and comply with such provisions as the Secretary may find necessary to assure the correctness and verification of such reports.

(b) An application submitted under § 395.2 shall be accompanied by a copy of State rules and regulations affecting the administration and operation of the State's vending facility program.

§ 395.4 State rules and regulations.

(a) The State licensing agency shall promulgate rules and regulations which have been approved by the Secretary and which shall be adequate to assure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings) and the operation of each vending facility in accordance with this part and with the requirements and conditions of each department, agency, and instrumentality in control of the maintenance, operation, and protection of Federal property, including the conditions contained in permits, as well as in all applicable Federal and State laws, local ordinances and regulations.

(b) Such rules and regulations and amendments thereto shall be filed or published in accordance with State law.

(c) Such rules and regulations shall include provisions adequate to insure that the right, title to, and interest in each vending facility used in the program and the stock will be vested in accordance with the laws of the State in only the following:

(1) The State licensing agency; or

(2) Its nominee, subject to the conditions specified in § 395.15(b); or

(3) The vendor, in accordance with State determination.

(d) Notwithstanding the provisions of paragraph (c) of this section, any right, title to, or interest which existed on June 30, 1955, in stock may continue so long as:

(1) The interest is in the stock of a facility established under the program prior to July 1, 1955, and

(2) The vendor was licensed in the program (whether or not for the operation of the vending facility in question) prior to July 1, 1955.

§ 395.5 Approval of application for designation as State licensing agency.

When the Secretary determines that an application submitted by a State vocational rehabilitation agency under § 395.2, and the accompanying rules and regulations indicate a plan of program operations which will stimulate and enlarge the economic opportunities for the blind, and which will meet all other requirements of this part, he shall approve the application and shall designate the applying State vocational rehabilitation agency as the State licensing agency.

§ 395.6 Vendor ownership of vending facilities.

(a) If a State licensing agency determines under § 395.4(c) that the right, title to, and interest in a vending facility may be vested in the blind vendor, the State licensing agency shall enter into a written agreement with each vendor who is to have such ownership. Such agreement shall contain in full the terms and conditions governing such ownership in accordance with criteria in the State licensing agency's regulations, this part, and the terms and conditions of the permit. The criteria established to govern the determination that the title may be so vested shall contain reasonable provisions to enable a vendor to

purchase vending facility equipment and to ensure that no individual will be denied the opportunity to become a vendor because of his inability to purchase the vending facility equipment or the initial stock;

(b) The State licensing agency shall establish in writing and maintain policies determining whether the vendor-owner or the State licensing agency shall be required to maintain the vending facility in good repair and in an attractive condition and replace worn-out or obsolete equipment; and if the former, such policies shall provide that upon such vendor-owner's failure to do so, the State licensing agency may make the necessary maintenance, replacement, or repairs and make equitable arrangements for reimbursement;

(c) Where the vendor owns such equipment and is required to maintain the vending facility in good repair and in an attractive condition and replace worn-out or obsolete equipment, or agrees to purchase additional new equipment, service charges for such purposes shall be equitably reduced and the method for determining such amount shall be established by the State licensing agency in writing;

(d) Where the vendor owns such equipment, the State licensing agency shall retain a first option to repurchase such equipment, and in the event the vendor-owner dies, or for any other reason ceases to be a licensee, or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency for transfer to a successor licensee subject to an obligation on its part to pay to such vendor-owner or his estate, the fair value therein; and

(e) This vendor-owner, his personal representative or next of kin shall be entitled to an opportunity for a full evidentiary hearing with respect to the determination of the amount to be paid by the State licensing agency for a vendor's ownership in the equipment. When the vendor-owner is dissatisfied with any decision rendered as a result

of such hearing, he may file a complaint with the Secretary under § 395.13 to request the convening of an ad hoc arbitration panel.

§ 395.7 The issuance and conditions of licenses.

(a) The State licensing agency shall establish in writing and maintain objective criteria for licensing qualified applicants, including a provision for giving preference to blind persons who are in need of employment. Such criteria shall also include provisions to assure that licenses will be issued only to persons who are determined by the State licensing agency to be:

(1) Blind;

(2) Citizens of the United States; and

(3) Certified by the State vocational rehabilitation agency as qualified to operate a vending facility.

(b) The State licensing agency shall provide for the issuance of licenses for an indefinite period but subject to suspension or termination if, after affording the vendor an opportunity for a full evidentiary hearing, the State licensing agency finds that the vending facility is not being operated in accordance with its rules and regulations, the terms and conditions of the permit, and the terms and conditions of the agreement with the vendor.

(c) The State licensing agency shall further establish in writing and maintain policies which have been developed with the active participation of the State Committee of Blind Vendors and which govern the duties, supervision, transfer, promotion, and financial participation of the vendors. The State licensing agency shall also establish procedures to assure that such policies have been explained to each blind vendor.

§ 395.8 Distribution and use of income from vending machines on Federal property.

(a) Vending machine income from vending machines on Federal property which has been disbursed to the State

licensing agency by a property managing department, agency, or instrumentality of the United States under § 395.32 shall accrue to each blind vendor operating a vending facility on such Federal property in each State in an amount not to exceed the average net income of the total number of blind vendors within such State, as determined each fiscal year on the basis of each prior year's operation, except that vending machine income shall not accrue to any blind vendor in any amount exceeding the average net income of the total number of blind vendors in the United States. No blind vendor shall receive less vending machine income than he was receiving during the calendar year prior to January 1, 1974, as a direct result of any limitation imposed on such income under this paragraph. No limitation shall be imposed on income from vending machines, combined to create a vending facility, when such facility is maintained, serviced, or operated by a blind vendor. Vending machine income disbursed by a property managing department, agency or instrumentality of the United States to a State licensing agency in excess of the amounts eligible to accrue to blind vendors in accordance with this paragraph shall be retained by the appropriate State licensing agency.

(b) The State licensing agency shall disburse vending machine income to blind vendors within the State on at least a quarterly basis.

(c) Vending machine income which is retained under paragraph (a) of this section by a State licensing agency shall be used by such agency for the establishment and maintenance of retirement or pension plans, for health insurance contributions, and for the provision of paid sick leave and vacation time for blind vendors in such State, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency has provided to each such vendor information on all matters relevant to such purposes. Any vending machine income not necessary for such purposes shall be used by the

State licensing agency for the maintenance and replacement of equipment, the purchase of new equipment, management services, and assuring a fair minimum return to vendors. Any assessment charged to blind vendors by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

§ 395.9 The setting aside of funds by the State licensing agency.

(a) The State licensing agency shall establish in writing the extent to which funds are to be set aside or caused to be set aside from the net proceeds of the operation of the vending facilities and, to the extent applicable, from vending machine income under § 395.8(c) in an amount determined by the Secretary to be reasonable.

(b) Funds may be set aside under paragraph (a) of this section only for the purposes of:

(1) Maintenance and replacement of equipment;

(2) The purchase of new equipment;

(3) Management services;

(4) Assuring a fair minimum of return to vendors; or

(5) The establishment and maintenance of retirement or pension funds, health insurance contributions, and provisions for paid sick leave and vacation time, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency provides to each such vendor information on all matters relevant to such proposed purposes.

(c) The State licensing agency shall further set out the method of determining the charge for each of the above purposes listed in paragraph (b) of this section, which will be determined with the active participation of the State Committee of Blind Vendors and which will be designed to prevent, so far as is practicable, a greater charge for

any purpose than is reasonably required for that purpose. The State licensing agency shall maintain adequate records to support the reasonableness of the charges for each of the purposes listed in this section, including any reserves necessary to assure that such purposes can be achieved on a consistent basis.

§ 395.10 The maintenance and replacement of vending facility equipment.

The State licensing agency shall maintain (or cause to be maintained) all vending facility equipment in good repair and in an attractive condition and shall replace or cause to be replaced worn-out and obsolete equipment as required to ensure the continued successful operation of the facility.

§ 395.11 Training program for blind individuals.

The State licensing agency shall ensure that effective programs of vocational and other training services, including personal and vocational adjustment, books, tools, and other training materials, shall be provided to blind individuals as vocational rehabilitation services under the Rehabilitation Act of 1973 (Pub. L. 93-112), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516). Such programs shall include on-the-job training in all aspects of vending facility operation for blind persons with the capacity to operate a vending facility, and upward mobility training (including further education and additional training or retraining for improved work opportunities) for all blind licensees. The State licensing agency shall further ensure that post-employment services shall be provided to blind vendors as vocational rehabilitation services as necessary to assure that the maximum vocational potential of such vendors is achieved and suitable employment is maintained within the State's vending facility program.

§ 395.12 Access to program and financial information.

Each blind vendor under this part shall be provided access to all financial data of the State licensing agency relevant to the operation of the State vending facility program, including quarterly and annual financial reports, provided that such disclosure does not violate applicable Federal or State laws pertaining to the disclosure of confidential information. Insofar as practicable, such data shall be made available in braille or recorded tape. At the request of a blind vendor State licensing agency staff shall arrange a convenient time to assist in the interpretation of such financial data.

§ 395.13 Evidentiary hearings and arbitration of vendor complaints.

(a) The State licensing agency shall specify in writing and maintain procedures whereby such agency affords an opportunity for a full evidentiary hearing to each blind vendor (which procedures shall also apply to cases under § 395.6(e)) dissatisfied with any State licensing agency action arising from the operation or administration of the vending facility program. When such blind vendor is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary. Such complaint shall be accompanied by all available supporting documents, including a statement of the decision which was rendered and the reasons in support thereof.

(b) The filing of a complaint under paragraph (a) of this section with either the State licensing agency or the Secretary shall indicate consent by the blind vendor for the release of such information as is necessary for the conduct of a full evidentiary hearing or the hearing of an ad hoc arbitration panel.

(c) Upon receipt of a complaint filed by a blind vendor which meets the requirements established by the Secre-

tary, the Secretary shall convene an ad hoc arbitration panel which shall, in accordance with the provisions of 5 U.S.C. chapter 5, subchapter II, give notice, conduct a hearing, and render its decision which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. chapter 7.

(d) The arbitration panel convened by the Secretary to hear the grievances of blind vendors shall be composed of three members appointed as follows:

(1) One individual designated by the State licensing agency;

(2) One individual designated by the blind vendor; and

(3) One individual not employed by the State licensing agency or, where appropriate, its parent agency, who shall be jointly designated by the other members of the panel and who shall serve as chairman of the panel.

(e) If either the State licensing agency or the blind vendor fails to designate a member of an arbitration panel, the Secretary shall designate such member on behalf of such party.

(f) The decisions of an arbitration panel convened by the Secretary under this section shall be matters of public record and shall be published in the FEDERAL REGISTER.

(g) The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses which shall be published in the FEDERAL REGISTER.

(h) The provisions of this section shall not require the participation of grantors of permits for the operation of vending facilities on property other than Federal property.

§ 395.14 The State Committee of Blind Vendors.

(a) The State licensing agency shall provide for the biennial election of a State Committee of Blind Vendors which,

to the extent possible, shall be fully representative of all blind vendors in the State program on the basis of such factors as geography and vending facility type with a goal of providing for proportional representation of blind vendors on Federal property and blind vendors on other property. Participation by any blind vendor in any election shall not be conditioned upon the payment of dues or any other fees.

(b) The State Committee of Blind Vendors shall:

(1) Actively participate with the State licensing agnecy in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program;

(2) Receive and transmit to the State licensing agency grievances at the request of blind vendors and serve as advocates for such vendors in connection with such grievances;

(3) Actively participate with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors;

(4) Actively participate with the State licensing agency in development of training and retraining programs for blind vendors; and

(5) Sponsor, with the assistance of the State licensing agency, meetings and instructional conferences for blind vendors with the State.

§ 395.15 Use of nominee agreements.

(a) The State licensing agency may enter into an agreement whereby another agency or organization undertakes to furnish services to blind vendors. Such agreement shall be in writing and shall contain provisions which:

(1) Clearly insure the retention by the State licensing agency of full responsibility for the administration and operation of all phases of the program;

(2) Specify the type and extent of the services to be provided under such agreement;

(3) Provide that no set-aside charges will be collected from blind vendors except as specified in such agreement;

(4) Specify that no nominee will be allowed to exercise any function with respect to funds for the purchase of new equipment or for assuring a fair minimum of return to vendors, except to collect and hold solely for disposition in accordance with the order of the State licensing agency any charges authorized for those purposes by the licensing agency; and

(5) Specify that only the State licensing agency shall have control with respect to selection, placement, transfer, financial participation and termination of the vendors, and the preservation, utilization and disposition of program assets.

(b) If the State licensing agency permits any agency or organization other than a vendor to hold any right, title to, or interest in vending facilities or stock, the arrangement shall be one permitted by State law and shall specify in writing that all such right, title to, or interest is held by such agency or organization as the nominee of the State licensing agency for program purposes and subject to the paramount right of the State licensing agency to direct and control the use, transfer, and disposition of such vending facilities or stock.

§ 395.16 Permit for the establishment of vending facilities.

Prior to the establishment of each vending facility, other than a cafeteria, the State licensing agency shall submit an application for a permit setting forth the location, the amount of space necessary for the operation of the vending facility; the type of facility and equipment, the number, location and type of vending machines and other terms and conditions desired to be included in the permit. Such

application shall be submitted for the approval of the head of the Federal property managing department, agency, or instrumentality. When an application is not approved, the head of the Federal property managing department, agency, or instrumentality shall advise the State licensing agency in writing and shall indicate the reasons for the disapproval.

§ 395.17 Suspension of designation as State licensing agency.

(a) If the Secretary has reason to believe that, in the administration of the program, there is a failure on the part of any State licensing agency to comply substantially with the Act and this part, he shall so inform such agency in writing, setting forth, in detail, the areas in which there is such failure and giving it a reasonable opportunity to comply.

(b) If, after the lapse of a reasonable time, the Secretary is of the opinion that such failure to comply still continues and that the State licensing agency is not taking the necessary steps to comply, he shall offer to such agency, by reasonable notice in writing thereto and to the chief executive of the State, an opportunity for a hearing before the Secretary (or person designated by the Secretary) to determine whether there is a failure on the part of such agency to comply substantially with the provisions of the Act and of this part.

(c) If it is thereupon determined that there is a failure on the part of such agency to comply substantially with the Act and this part, appropriate written notice shall be given to such agency and to the chief executive of the State suspending such agency's designation as licensing agency effective 90 days from the date of such notice. A copy of such written notice shall be given to each department, agency, or instrumentality of the United States responsible for the maintenance, operation, and protection of Federal property on which vending machines subject to

the requirements of § 395.32 are located in the State. Upon the suspension of such designation, vending machine income from vending machines on Federal property due for accrual to the State licensing agency under § 395.32 shall be retained in escrow by such department, agency, or instrumentality of the United States responsible for the maintenance, operation and protection of the Federal property on which such vending machines are located, pending redesignation of the State licensing agency or rescission of the suspension under paragraph (e) of this section.

(d) If, before the expiration of such 90 days, the Secretary (or person designated by him) determines that the State licensing agency is taking the necessary steps to comply, he may postpone the effective date of such suspension for such time as he deems necessary in the best interest of the program.

(e) If, prior to the effective date of such suspension, the Secretary (or person designated by him) finds that there is no longer a failure on the part of the State licensing agency to comply substantially with the provisions of the Act and this part, he shall so notify the agency, the chief executive of the State, and each Federal department, agency, or instrumentality required to place funds in escrow under paragraph (c) of this section, in which event the suspension of the designation shall not become effective and the requirement to place funds in escrow shall be terminated.

(2)

No. 89-1897

In The

Supreme Court of the United States

OCTOBER TERM, 1989

BILLIE R. SCHLANK,
Petitioner,

v.

KATHERINE A. WILLIAMS, ACTING ADMINISTRATOR, REHABILITATION SERVICES ADMINISTRATION OF THE COMMISSION ON SOCIAL SERVICES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

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16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

STATUTES

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals, A. 1a-27a,[1] is reported at 572 A.2d 101 (D.C. 1990).

STATEMENT OF THE CASE

Petitioner (the "vendor"), a blind person, operates a vending stand in the United States Department of State under the Randolph-Sheppard Vending Stand Act, 20 U.S.C.

[1] "A." references are to documents included in the Appendix to the Petition.

§§ 107-107f (1988).[2] She seeks reversal of a decision of the District of Columbia Court of Appeals affirming an order of the Superior Court of the District of Columbia denying her motion for attorneys fees.

The vendor filed an action in the Superior Court against the Acting Administrator of the Rehabilitative Services Administration of the Commission on Social Services of the District of Columbia Department of Human Services seeking the right to service vending machines in the State Department in areas outside her facility, to have her stand reclassified for purposes of promotion and transfer, to incorporate her business or be exempted from the business franchise tax and receive a refund of taxes paid, and to deduct legal fees as part of her operating expenses for calculating her "net proceeds."[3]

On cross-motions for summary judgment, the Superior Court held that the vendor had a right to incorporate; certified the tax issues to the court's tax division; declared invalid certain program instructions used as a basis to deny the vendor's application to service vending machines in the State Department, but left the issue of whether there were other valid reasons for denial for trial; invalidated the state agency's formula to determine the performance standard for promotion and transfer; and rejected the vendor's argument that she could deduct legal fees from net proceeds in determining her contribution to a required administrative set-aside for the benefit of all blind vendors. A. 7a-8a.

The vendor then moved for attorneys fees, but the Superior Court denied the motion. Relying on the American Rule, the court determined that the Randolph-Sheppard Act itself did

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[2] The Act is administered by the federal Rehabilitative Services Administration of the Department of Education and by the Rehabilitative Services Administration of the Commission on Social Services of the D.C. Department of Human Services, which is a "state agency" under the Act. The District of Columbia is considered a "state" for purposes of the Act. *See* 20 U.S.C. § 107e(5) (1988).

[3] The vendor also moved to maintain a class action, which motion was denied.

not provide for the award of attorneys fees, and expressly rejected the vendor's assertion that the defendants' conduct was in bad faith. A. 42a-45a. The District of Columbia Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY REFUSED TO AWARD ATTORNEYS FEES UNDER THE AMERICAN RULE, SET FORTH BY THIS COURT IN *ALYESKA*, AS THE RANDOLPH-SHEPPARD ACT DOES NOT EXPRESSLY AUTHORIZE FEE SHIFTING.

Under the American Rule, set forth in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), each party bears its own litigation expenses unless the court is authorized to shift fees by an express statutory or contractual provision or under one of the three equitable exceptions to the rule—*i.e.*, where a party has preserved or recovered a common fund benefiting others, shown "willful disobedience of a court order," or "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 257-258.[4]

The vendor does not argue before this Court that the D.C. Court of Appeals erred in affirming the Superior Court's rejection of her claim that the respondent had acted in bad faith. A. 21a-22a, 43a. Nor does she argue that any of the other equitable exceptions to the American Rule apply. Instead, she relies entirely on the theory that the Randolph-Sheppard Act itself authorized an award of attorneys fees.

However, the vendor has not pointed to any provision of the Act authorizing fee shifting or cited any legislative

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[4] This Court has recently reaffirmed this decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. ____, 109 S.Ct. 2732 (1989). *See also, Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

history evidencing a congressional intent to shift fees.[5] Rather, she argues that the authority to shift fees can be implied from a legislative intent to make whole vendors injured by violations of the Act or from contractual obligations toward those vendors, as third-party beneficiaries, arising from a state's participation in the federal program. Pet. at 6. As we shall show, the decisions of this Court do not permit exceptions to the American Rule based on such reasoning.

II. THE VENDOR'S ARGUMENT THAT AN EXCEPTION TO THE AMERICAN RULE MAY BE IMPLIED FROM A LEGISLATIVE INTENT TO MAKE A PROTECTED PERSON WHOLE OR FROM CONTRACTUAL OBLIGATIONS ARISING FROM A STATE'S PARTICIPATION IN A FEDERAL PROGRAM IS CONTRARY TO THIS COURT'S DECISIONS IN *F.D. RICH, SUMMIT VALLEY*, AND *PENNHURST*.

Following the Third Circuit's decision in *Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), the vendor argues that the American Rule does not apply because "[t]he District of Columbia, by virtue of its participation in the Federal blind vendors program, [has] undertaken to make blind vendors whole for breach of its contractual obligations" and that " 'the blind vendors became, in effect third party beneficiaries of agreements between the participating states and the federal government.' " Pet. at 9, *quoting Delaware*, *supra*, 772 F.2d at 1127. As the D.C. Court of Appeals pointed out (A. 19a), and as we explain, *infra*, Part III, this case is distinguishable

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[5] The Act, thus, stands in stark contrast to the Acts of Congress mentioned by this Court in *Alyeska*, which contained "specific and explicit provisions for the allowance of attorneys' fees." 421 U.S. at 260.

on its facts from *Delaware*. More fundamentally, this approach is precluded by the decisions of this Court in *F.D. Rich Company v. United States ex rel. Industrial Labor Company, Inc.*, 417 U.S. 116 (1974); *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717 (1982); and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1971).

In *F.D. Rich*, this Court reversed a decision of the Ninth Circuit authorizing an award of attorneys fees to a successful litigant under the Miller Act. The Court recognized that "[t]he Miller Act is 'highly remedial [and] entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labors and materials go into public projects.' " 417 U.S. at 124, *quoting MacEnvoy & Company v. United States ex rel. Tomkins Company*, 322 U.S. 102, 107 (1944). However, the Court rejected the Ninth Circuit's theory that "in providing Miller Act claimants should recover 'sums justly due,' 40 U.S.C. § 270b(a), Congress must have intended to provide for the award of attorneys' fees because without such fee shifting, Miller Act claimants would not be fully compensated . . ." 417 U.S. at 128. The Court noted that "[t]his argument merely restates one of the oft-repeated criticisms of the American Rule." *Id.*

Likewise, in *Summit Valley*, this Court refused to construe a provision in the National Labor Relations Act entitling a person injured in violation of the Act to "damages" to permit an award of attorneys fees. 456 U.S. at 722-723. The Court, like the one in *F.D. Rich*, was not impressed by the fact that the statute was remedial in nature or that it was designed to make the injured litigant whole. As the Court noted:

> Ultimately, petitioner's argument rests on the assumption that "Congress plainly intended Section 303 [29 U.S.C. § 187(b)] to be *fully* remedial and to restore to the victimized employer *all . . . losses* caused by the illegal activity . . . ." Even assum-

> ing that attorneys fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. *F.D. Rich Co v. United States ex rel. Industrial Lumber Co.* . . .

456 U.S. at 724-725 (emphasis in original).

While the vendor attempts to distinguish these cases—*F.D. Rich* on the ground that it involved "commercial" litigation, and *Summit Valley* on the ground that it involved "a private damages action between an employer and union," Pet. at 11 n. 6—she cannot show that the principle for which they stand does not apply here. Although the Randolph-Sheppard Act is remedial and entitled to liberal construction, so are the Acts of Congress construed in these cases. This Court described the Miller Act as "highly remedial" and the National Labor Relations Act as "fully remedial."

Moreover, those Acts contain provisions expressly giving a protected injured person a private cause of action with the right to recover "sums justly due," and "damages," respectfully. *See* 40 U.S.C. § 270b(a) (1988); 29 U.S.C. § 187(b) (1988). The Randolph-Sheppard Act contains no such provision and, therefore, is even less susceptible to a construction that it provides authority to shift fees. That this Court, in light of the American Rule, refused to read a right to attorneys fees into either of these two remedial Acts, even though those Acts contained express policies to make injured parties whole and rights to compensation, strongly supports the D.C. Court of Appeals' conclusion that no similar right should be read into the Randolph-Sheppard Act.[6]

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[6] The D.C. Court of Appeals' decision finds further support in *Runyon v. McCrary*, 427 U.S. 160, 183-185 (1976), in which the Court refused to read 42 U.S.C. § 1988, as it then read, as authorizing an award of attorneys fees to parents of Black children who were excluded from admission to Virginia private schools solely on racial grounds. That the Court declined to construe this highly remedial provision of the Civil Rights Act to authorize attorneys fees argues in favor of not construing the Randolph-Sheppard Act to permit fee shifting, in the absence of express congressional direction.

Nor can fee shifting here be justified on an implied contract theory based on the District's participation in a federal-state program established by federal legislation. Under *Pennhurst State School and Hospital v. Halderman*, *supra*, a state participating in such a program cannot be deemed to have agreed to be liable for financial burdens, such as attorneys fees, unless such consequences are spelled out unambiguously in the Act establishing the program. Since the Randolph-Sheppard Act does not provide for fee shifting, this financial liability on the part of the District cannot be implied.

In *Pennhurst*, this Court reversed a circuit court decision holding that mentally retarded residents of a state facility receiving federal funds under the Developmentally Disabled Assistance and Bill of Rights Act of 1975 were entitled to "appropriate treatment" in the "least restrictive environment." The Court held:

> . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power thus rests on whether the State voluntarily or knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.* By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (emphasis added). *Accord*, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Board of Education of the Hendrick Hudson Central School District Board of Education, Westchester County v. Rawley*, 458 U.S. 176, 204 n.26 (1982).

The Randolph-Sheppard Act, like the Developmentally Disabled Assistance and Bill of Rights Act of 1975, requires

participating states to enter into agreements with the federal government for the benefit of the persons protected by those Acts. *See* 20 U.S.C. § 107b (1988). Had Congress intended that a consequence of a state's participation in this program would be to expose it to civil liability for damages and attorneys fees, Congress certainly knew how to do so. The absence of any evidence of such an intent in the text or legislative history of the Randolph-Sheppard Act precludes construing the Act to permit attorneys fees, since under *Pennhurst* this Court "may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." 451 U.S. at 17.

Indeed, a majority of the Eighth Circuit in *McNabb v. United States Department of Education*, 862 F.2d 681 (8th Cir. 1988), *cert. denied,sub. nom., McNabb v. Cavazos*, ___ U.S. ___, 110 S.Ct. 55 (1989), expressly relied on *Pennhurst* in ruling that the Randolph-Sheppard Act cannot be construed to make participating states liable for compensatory damages and, *a fortiori*, attorneys fees. See 862 F.2d 685 (Fagg, J.) and 687-688 (Doty, J.). As Judge Fagg noted, "[n]either Congress, nor a court interpreting the Act, is permitted to 'surpris[e] participating [s]tates with post-acceptance . . . conditions.' " *Id.* 687 (Fagg. J., concurring and dissenting), *quoting Pennhurst, supra*, 451 U.S. at 25.

Therefore, the vendor's argument that a right to attorneys fees under the Randolph-Sheppard Act can be implied runs afoul of the decisions of this Court.

III. THE DECISIONS CITED BY THE VENDOR ARE DISTINGUISHABLE.

In addition to *Delaware*, the vendor relies on decisions of the Eighth Circuit in *McNabb v. United States Department of Education, supra*; the Fourth Circuit in *Almond v. Boyles*, 792 F.2d 451 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); and the District Court for the District of Columbia in *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F.Supp. 292 (D.D.C. 1990). These cases are all distinguishable.

A. The vendor's reliance on *McNabb* is surprising, since, as noted above, that case is directly contrary to her position. In *McNabb*, a blind vendor filed a grievance after a vending facility he sought was awarded to a vendor with less seniority. The federal arbitration panel ruled that he was entitled to the vending facility and that he had the right to request that the panel be reconvened to award him compensatory damages and attorneys fees. The Secretary of Education refused to reconvene the panel, but the district court ordered the Secretary to reconvene the panel, holding that an arbitration panel had the authority to make such awards. The Eighth Circuit affirmed the order of the district court to reconvene the panel, but did not decide the issue of the authority of an arbitration panel to award attorneys fees. Indeed, a majority of the court held that the Randolph-Sheppard Act did *not* give an injured person a right of action against a state for compensation for injuries. It only left open the possibility that attorneys fees might be assessed against the *Secretary* as a consequence of his refusal to convene a panel, but did not decide that question, leaving its resolution to the arbitration panel.

Each member of the three-judge panel wrote a separate opinion. Chief Judge Lay, the only member who believed that an arbitration panel could award compensatory damages against a state, held simply that the authority to award attorneys fees as part of compensatory damages is a question more properly decided in the first instance by the arbitration panel when it reconvenes." 862 F.2d at 685. Judge Fagg sharply disagreed with Judge Lay's statement that the Act permitted the panel to award compensatory damages against a state, *id.* at 685-696, but agreed that "the arbitration panel may determine that attorneys fees should be paid by the Secretary of Education rather than the State of Arkansas." *Id.* at 687. Judge Doty sided with Judge Fagg on this question. While stating that, "[u]nder [20 U.S.C.] § 107d-2(d) . . . the vendor should . . . be reimbursed for any costs, including reasonable attorney's fees, made necessary by the acts of the Secretary," he made it clear that

attorneys fees could not be awarded against a *state*, noting that this holding would "avoid the onerous effect on a state treasury of retroactive damages." 862 F.2d at 687. Thus, a majority of the Eighth Circuit held that the Randolph-Sheppard Act could not be construed to permit an award of compensatory damages against a state for violation of the Act. If the Act does not permit compensatory damages against a state, *a fortiori*, it does not permit an award of attorneys fees.

Furthermore, all three judges distanced themselves from the Third Circuit's holding in *Delaware*. Chief Judge Lay distinguished *Delaware* on the ground that the matter had been fully arbitrated in that case. *Id.* at 685. Both Judges Fagg and Doty directly criticized the decision on the ground that the financial burden imposed on the state simply from its participation in the blind vendor program conflicted with *Pennhurst*. *See* 862 F.2d at 686 (Fagg. J.) and 687-688 (Doty, J.). Judge Doty stated "I would not follow the holding of the Third Circuit in Delaware . . . as I believe the legal underpinnings of that case have been fatally eroded." *Id.* at 687-688. Thus, *McNabb* rejects, rather than supports, the vendor's argument.

B. The Fourth Circuit's decision in *Almond* did not address the issue at hand. In that case, blind vendors brought an action to recover "employer" and "employee" contributions, which North Carolina had wrongfully required them to pay in clear violation of the Act, which treats vendors as self-employed, independent contractors. The district court awarded plaintiffs attorneys fees, and increased the lodestar by 50 percent owing to the complexity, novelty, and contingent nature of the case. The Fourth Circuit *reversed* the district court's award, concluding that the District Court "applied the wrong standard in calculating the award [of attorneys fees]." 792 F.2d at 456. However, the issue of the authority of the district court to make the award in the first place was not before the Circuit because the defendants had not challenged the court's authority. They had merely contended that the court had "abused its discretion in the award

of attorneys' fees." *Id.* As the Superior Court noted, in distinguishing *Almond* from the case at hand, "the issue of *whether* there was statutory authority for an award of counsel fees was not contested, and therefore not decided or considered, by the Fourth Circuit." A. 44a (emphasis in original). Thus, *Almond* did not even address the issue of whether the Randolph-Sheppard Act authorized fee shifting.

C. As the D.C. Court of Appeals pointed out, the Third Circuit's decision in *Delaware* is distinguishable from this case. As the court below noted, *Delaware* relied on the "broad make-whole powers of [an] arbitration panel" under federal law, rather than the powers of a state court. A. 19a, *quoting Delaware*, *supra*, 772 F.2d at 1140.[7] Whether an arbitration panel possesses the authority to grant attorneys fees under any circumstances has been disputed. *See Georgia Department of Human Resources v. Bell*, 528 F.Supp. 17, 25 (N.D.Ga. 1981).[8] But, even assuming *arguendo* that a federal arbitration panel possesses this power, as the D.C. Court of Appeals noted, "[o]nly by analogy can the proceedings in Superior Court in this case be said to have mirrored the arbitration panel's decision in *Delaware*." A. 19a. The Superior Court does not possess the powers of a federal arbitration panel and is clearly limited by the American Rule, which is part of the common law. *See Alyeska*, *supra*, 421

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[7] Indeed, as the court in *Delaware* emphasized, 772 F.2d at 1130:

> . . . No witness in hearings on S. 2582. and no member of Congress ever suggested that the scope of relief which could be awarded in these arbitration proceedings, agreed to by virtue of a state's voluntary participation in the Randolph-Sheppard program, was in any degree different than that available in other arbitration proceedings.

[8] That court observed:

> [20 U.S.C. §] 107d-2(d) of the Act provides that "[t]he Secretary shall pay all reasonable costs of arbitration . . . in accordance with a schedule of fees and expenses he shall publish in the Federal Register." This Court finds that, by specifically directing the Secretary to pay for arbitration expenses in accordance with a schedule of fees, Congress foreclosed any action by an arbitration panel to award arbitration expenses.

U.S. at 247. Moreover, the single statutory peg on which the court in *Delaware* based its decision, 20 U.S.C. §107d2(d), which provides that "[t]he Secretary [of Education] shall pay all reasonable costs of arbitration . . .," clearly does not apply to the Superior Court. Therefore, the analogy of *Delaware* to this case is inapt.

D. Finally, the vendor relies on the decision of the District Court for the District of Columbia in *Committee of Blind Vendors of the District of Columbia v. District of Columbia, supra.* Pet at 10. However, on July 31, 1990, that court issued a memorandum decision, on defendants' motion to alter or amend the judgment, *distinguishing* this case from that before the district court:

> Admittedly, the Court of Appeals' very thorough analysis in *Schlank* gives this Court some pause. Nonetheless, in light of the very unique circumstances presented by this case, the Court distinguishes *Schlank* and reaffirms its prior conclusion that a fee award is justified. While *Schlank* involved the claims of one vendor, this case involved myriad claims by 63 blind vendors, who ultimately sought to compel the District's overall compliance with a federal program.

Committee of Blind Vendors of the District of Columbia v. District of Columbia, 1990 WL 116813 (Civ. Act. No. 88-0142-OG, D.D.C. July 31, 1990).

In any event when the district court makes an award of attorneys fees, the District of Columbia intends to appeal, and the District of Columbia Circuit will have the opportunity to express its views on the question of whether the Randolph-Sheppard Act authorizes fee-shifting.

* * *

In sum, the D.C. Court of Appeals and Superior Court of the District of Columbia correctly applied the American Rule in this case. In the absence of any express statutory or contractual provision or equitable principle authorizing fee shift-

ing, the courts below correctly refused to award attorneys fees. The vendor's arguments, if accepted, would create a new and broad exception to the American Rule under which courts could award attorneys fees by reason of a state's participation in a federal program. We submit that the vendor's argument is contrary to this Court's decisions in *Alyeska*, *F.D. Rich*, *Summit Valley*, and *Pennhurst*, and should be rejected.

CONCLUSION

The petition should be denied.

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